









REEVES'  
HISTORY OF THE ENGLISH LAW.

EDITED BY  
W. F. FINLASON.



REEVES'  
HISTORY OF THE ENGLISH LAW,

FROM THE

TIME OF THE ROMANS

TO THE

END OF THE REIGN OF ELIZABETH.

A NEW EDITION, IN THREE VOLUMES.

WITH NUMEROUS NOTES, AND

AN INTRODUCTORY DISSERTATION

ON

THE NATURE AND USE OF LEGAL HISTORY, THE RISE AND PROGRESS OF OUR LAWS,  
AND THE INFLUENCE OF THE ROMAN LAW IN THE FORMATION OF OUR OWN.

BY W. F. FINLASON, Esq.,

BARRISTER-AT-LAW.

VOL. I.

FROM THE TIME OF THE ROMANS TO THE END OF THE  
REIGN OF HENRY III.

LONDON :  
REEVES & TURNER, CHANCERY LANE.

1869.

EDINBURGH :  
PRINTED BY BALLANTYNE AND COMPANY,  
PAUL'S WORK.

TO  
THE RIGHT HON. SIR JOHN TAYLOR COLERIDGE,

SOMETIME  
ONE OF THE JUDGES OF THE COURT OF QUEEN'S BENCH,

WHO,  
BEFORE HIS ELEVATION TO THE OFFICE OF JUDGE,  
HAD ACQUIRED REPUTATION AS A JURIST,  
BY HIS VALUABLE EDITION OF  
THE COMMENTARIES ON THE LAWS OF ENGLAND,  
THIS EDITION

OF  
THE HISTORY OF THE LAWS OF ENGLAND

Is Dedicated

(WITH HIS KIND PERMISSION)

IN TESTIMONY OF PROFOUND VENERATION FOR THOSE GREAT GIFTS, AND EMINENT ACQUIREMENTS

BY WHICH,  
DURING HIS DISTINGUISHED CAREER,  
HE ADORNED THE JUDICIAL BENCH,  
AND ADDED NEW LUSTRE TO A NAME AND FAMILY ALREADY ILLUSTRIOUS.



# CONTENTS OF THE FIRST VOLUME.

	PAGE
AUTHOR'S PREFACE TO THE FIRST EDITION, . . . .	ix*
PREFACE TO THE PRESENT EDITION, . . . .	xv*
INTRODUCTION TO THE PRESENT EDITION, . . . .	i

## CHAPTER I.

### SAXONS.

The Laws of the Saxons—Thainland and Reveland—Freemen—Slaves—The Tourn—County Court—Other Inferior Courts—The Wittenagemote—Nature of Landed Property—Method of Conveyance—Decennaries—Criminal Law—Were—Murder—Larceny—Deadly Feuds—Sanctuary—Ordeal—Trials in Civil Suits—Alfred's Domboc—Compilation made by Edward the Confessor—Saxon Laws, . . . .	1-52
--	------

## CHAPTER II.

### WILLIAM THE CONQUEROR TO HENRY II.

The Conquest—Saxon Laws Confirmed—The Laws of William the Conqueror—Trial by Duel in Criminal Questions—Establishment of Tenures—Nature of Tenures—Different Kinds of Tenures—Villanage—Of Escuage—Consequences of Tenure—Of Primogeniture—Of Alienation—Of Judicature—The Curia Regis—Justices Itinerant—The Bench—The Chancery—Judicature of the Council—Of the Spiritual Court—Of the Civil and Canon Law—Doctrines of the Canon Law—Probate of Wills—Constitutions of Clarendon—Of Trial by Duel in Civil Questions—Of Trial by Jury—By the Assize—Of Deeds—A Feoffment—A Fine—Of Writs—Of Records, . . . .	53-148
---	--------

## CHAPTER III.

### HENRY II.

Of Villeins—Dower—Alienation—"Nemo potest esse Hæres et Dominus"—Of Descent—Of Testaments—Of Wardship—Marriage—Of Bastardy—Usurers—Of Escheat—Maritagium—Homage—Relief—Aids—Administration of Justice—A Writ of Right—Essoins—Of Summons—Of Attachment—Counting upon the Writ—The Duel—The Assize—Vouching to Warrant—Writ of Right of Advowson—Of Prohibition to the Ecclesiastical Court—The Writ de Nativis—Writ of Right of Dower—Dower unde Nihil, . . . .	149-201
---	---------

## CHAPTER IV.

### HENRY II. TO JOHN.

Of Fines—Of Records—Writ de Homagio Recipiendo—Purpresture—De Debitis Laicorum—Of Sureties—Mortgages—Debts ex empto et vendito—Of Attornies—Writ of Right in the Lord's Court—Of Writs of Justices—Writs of Replevin—and of Prohibition—Of Recognitions—Assisa Mortis Antecessoris—Exceptions to the Assize—Assisa Ultimæ Præsentationis—Assisa Novæ Disseisinæ—Of Terms and Vacations—The Criminal	
---	--



Law—Of Abjuration—Mode of Prosecution—Forfeiture—Homicide—Rape—Proceeding before Justices Itinerant—The King and Government—The Charters—The Characters of these Kings as Legislators—Laws of William the Conqueror—Of the Statutes—Domesday Book—Glanville—Miscellaneous Facts, 202-259

## CHAPTER V.

HENRY III.

Magna Charta—Tenures—Alienation—Mortmain—Communia Placita non sequantur Curiam nostram—Justices of Assize—Amercements—Nullus liber Homo, &c.—Præcipe in Capite—Sheriff's Criminal Judicature—The Writ de Odio et Atiâ—Charta de Forestâ—The Judicature of the Forest—Punishments—Charters Confirmed—Statutum Hiberniæ—Statute of Merton—Of Commons—Of Special Bastardy—Ranks of Persons—Of Villenage—Of Free Services—Of Serjeanty—Scutagium—Homage and Fealty—Of Wardship and Marriage—Of Gifts of Land—By whom—To whom—Of Simple Gifts—Of Conditional Gifts—Estates by the Courtesy—Of Reversions—Gifts ad Terminum—Livery—Rights—Testaments—Ecclesiastical Jurisdiction therein—Of Descent—De Partu Supposito—Of Partition—Dower, 260-335

## CHAPTER VI.

HENRY III.

Of Actions—Of Courts—Writs—Of Disseisin—Assize of Novel Disseisin—Form of the Writ—Proceeding thereon—Of the Verdict—Exceptions to the Assize—Assisa vertitur in Juratam—Quare ejecit infra Terminum—Assize of Common—Of Nuisance—Assisa Ultimæ Præsentationis—Exceptions thereto—Of Quare Impedit—Quare non Permittat—Assisa Mortis Antecessoris—Vouching of Warrantor—Where this Writ would lie—Writ de Consanguinitate—Quod Permittat—Assisa Utrum—Of Convictions—and Certificates—Of different Trials—Dower unde Nihil—Writ of Right of Dower—Of Waste—Of Writs of Entry—Different Kinds thereof, 336-395

## CHAPTER VII.

HENRY III.

Writ of Right in the Lord's Court—Process in Real Actions—Summons—Of Essoins—De Malo Lecti—Defaults—Magnum Cape—Warrant de Servitio Regis—Parvum Cape—Writ of Quo Warranto—The Count—Tender of the Demi-Mark—Defence—Of Granting a View—Vouching to Warranty—Nature of Warranty—Proof of Charters—Warrantia Chartæ—Of Pleading—Of Prohibitions—Attachment sur Prohibition—Of Jurisdiction—Abatement of the Writ—Pleas to the Person—Of Bastardy—Writ to the Ordinary—Of Minority—Excommunication—Parceners—Pleas to the Action—Non Tenure—Majus Jus—Release—Fine and Non Claim—Of Personal Actions—Attachment—Execution of the Writ, 396-458

## CHAPTER VIII.

HENRY III.

The Eyre—The Jury—Capitula Itineris—Of Læse-Majesty—Who to Judge thereof—Of Homicide—The Office of the Coroners—Imprisonment and Bail—Of Outlawry—At the King's Suit—Reversal of Outlawry—Of Murdrum—Presentment of Englishery—Abjuration—Ordeal goes out of Use—The Duel—Appeal of Homicide—Exceptions thereto—Proceeding per Famam Patriæ—Of other Appeals—Of Theft—Of Provors—Of Vetitum Nannium—Dies Communes in Banco—Statute of Marlbridge—Distresses—Writ of Entry in the Post—Legatine and Provincial Constitutions—The King and Government—Statutes—Bracton—Miscellaneous Facts, 459-533

## AUTHOR'S PREFACE TO THE FIRST EDITION.

THE History which I now presume to offer to the profession of the law, is an attempt to investigate and discover the first principles of that complicated system which we are daily discussing (a).

It has happened to the law, as to other productions of human invention, particularly those which are closely connected with the transactions of mankind, that a series of years has gradually wrought such changes as to render many parts of it obsolete ; so that the jurisprudence of one age has become the object of mere historic remembrance in another. Of the numerous volumes that compose a lawyer's library, how many are consigned to oblivion by the revolutions in opinions and practice !—and what a small part of those which are still considered as in use, is necessary for the purposes of common business ! Notwithstanding, therefore, the multitude of books, the researches of a lawyer are confined to writers of a certain period. According to the present course of study, very few indeed look further than Coke and Plowden. Upon the same scale of inquiry, the Year-Books are considered rather in the light of antiquities ; and Glanville, Bracton, and Fleta as no longer a part of our law.

It is in such a state of our jurisprudence that a history of the causes and steps by which these revolutions in legal learning have been effected, becomes curious and useful. But, notwithstanding the inquisitive spirit of the present age has given birth to histories of various sciences, we have nothing of this kind upon our law, except Sir Matthew Hale's *History of the Common Law*, published from a posthumous manuscript at the beginning of the present century. There have not, however, been wanting historical discourses, which have incidentally, and in a popular way, examined the progress of certain branches of the law, and during certain

(a) The author, no doubt, meant the origin of those principles, his being a work, not on law, but legal history. It may be doubted, however, whether he was sufficiently alive to this distinction, and whether he did, to his mind it did not appear that the statement of the law, as it stood at successive periods in our history—was not all that was involved in a history of our law. But it is conceived that, to satisfy the requirements of legal history, it is necessary to trace the whole course and progress of our laws, so as to show their gradual development, and the causes which led to the changes to be observed in them. And further, that the history must be traced back to the earliest period at which civilised law can have had its origin.

periods; such as those of Bacon, Sullivan, Dalrymple, Henry, and others.

Sir Matthew Hale, as a writer upon English law, possesses a reputation which can neither be increased nor diminished by anything that may be said of his History. We may therefore freely observe, that it is only an imperfect sketch, containing nothing very important nor very new. What seemed most to be expected, namely, an account of the changes made in the rules and maxims of the law, is very lightly touched (*a*). In short, the early period to which this work is confined, and the cursory way in which that period is treated, scarcely serve to give a taste of what a history of the law might be.

Sir William Blackstone, though in a smaller compass, has given a plan of a much better history than the former; and if the one excited a wish for something more complete, the other seems to have traced out a scheme upon which it might be executed. It was the chapter at the end of the *Commentaries* which persuaded me of the utility of such a work, if filled up with some minuteness upon the outline there drawn. It seemed, that after a perusal of that excellent performance, the student's curiosity is naturally led to inquire further into the origin of the law, with its progress to the state at which it is now arrived.

The plan on which I have pursued this attempt at a History of our Law is wholly new. I found that modern writers, in discoursing of the ancient law, were too apt to speak in modern terms, and generally with a reference to some modern usage. Hence it followed, that what they adduced was too often distorted and misrepresented, with a view of displaying, and accounting for, certain coincidences in the law at different periods. As this had a tendency to produce very great mistakes, it appeared to me that, in order to have a right conception of our old jurisprudence, it would be necessary to forget, for a while, every alteration which had been made since, to enter upon it with a mind wholly unprejudiced, and to peruse it with the same attention that is bestowed on a system of modern law. The law of the time would then be learned in the language of the time, untinctured with new opinions; and when that was clearly understood, the alterations made therein in subsequent periods might be deduced, and exhi-

(*a*) It is conceived that the author very much undervalued Lord Hale's history, and that, so far as it went, it far more resembled a real history of law than his own. It exhibits far more of the cause and progress of our laws, and gives a more just and comprehensive view of the materials whence our laws were derived. Hale's account, for instance, of the true measure and nature of the effect of the Conquest upon our laws and institutions, is infinitely more complete and more correct than our author's, and therefore is embodied in the notes to the text. So Hale distinguishes the reigns between the Conquest and the Great Charter, especially the important reigns of Henry I. and Henry II., each of which makes an era in the history of our law; whereas the author treats the whole of that period together, and hence fails to give a clear idea of the course of our legal history during that important period. The present Editor has made Lord Hale his model of what a legal history should be.

bited to the mind of a modern jurist in the true colours in which they appeared to persons who lived in those respective periods. Upon the same reasoning, it appeared to me, that if our statutes, and the interpretation of them, with the variations that have happened in the maxims, rules, and doctrines of the law, were presented to the reader in the order in which they successively originated; such a history, from the beginning of our earliest memorials down to the present time, would not only convey a just and complete account of our whole law as it stands at this day, but place many parts of it in a new and more advantageous light than could be derived from any institutional system; in proportion as an arrangement conformable with the nature of the subject surpasses one that is merely artificial.

The following volumes are written upon this idea; and being, in that view, an introductory work, they will, I trust, be as intelligible to a person unacquainted with law books as to those of the profession. It was partly with this design that I have contented myself with a simple narrative, making few allusions to what the law became in later times, but leaving that to be mentioned in its proper place. Many inferences and discussions which seem to be suggested by our ancient laws have not entirely escaped me; but are reserved for a place to which, agreeably with the plan of this History, I thought them better adapted. Every one who looks into our old law, feels a strong propensity for remarking on the changes it has since undergone; but when the several steps which led to those changes are traced in a continued narrative down to the present time, such observations would be premature, unnecessary, and irksome.

My object being jurisprudence, and not antiquities, I have confined my researches to certain printed books of established reputation and authority, where alone I could hope to find the juridical history of the times in which they were written (*a*). It may not, perhaps, be unsatisfactory to the reader, who knows what respect is due to the venerable remains of our ancient law, to be told that the whole of GLANVILLE, and what seemed to be the most interesting part of BRACTON, is incorporated into this work.

A few observations may be necessary to prevent the reader being disappointed in that part of the following work which treats of the

(*a*) The author no doubt meant the *materials* for the History; but, as already observed, there is great reason to believe that he supposed the mere statement of the law, as it stood at successive periods, was legal history. For the authors whom he names did no more than state the law at the times at which they wrote, and the author simply copies them into his pages. That, it is manifest, is not of itself history, however valuable may be the *materials* they afforded for history. The author unhappily failed to appreciate a work more illustrative of our whole legal history for the period from the Saxon monarchy to the Great Charter, than any other work extant, and that is the *Mirror of Justice*—a work of which large portions were, it is manifest, written in the time of Alfred, and which was re-composed in the time of Edward I. Lord Coke thought very highly of it; but our author failed to draw much information from it as to the course of our legal history. So of the *Leges Henrici Primi* and Britton. In the present edition these deficiencies are supplied as far as possible in notes.

statutes. The old statutes have long been considered in a remote point of view, being rarely taken into the course of a student's reading, but referred to as occasion requires, and are then understood by the help of notes and commentaries. It might be expected that a History of the Law should furnish more notes and more commentaries upon this subject, as the only known means of illustration; on the contrary, the laws of Henry III. and Edward I. are here very little more than clearly stated, in a language somewhat more *readable*, if I may use the expression, than that of the Statute-book.

What was before said upon the general design of the work will, I hope, satisfy the reader that nothing further was requisite on this subject. As an account of the revolutions in our law antecedent to the making of those statutes must, altogether, contain an account of the law as it stood when they were made, it follows that the reader enters upon them with a previous information, which will enable him to comprehend their import, on the bare statement of their contents. As to the opinions and principles that were founded on those statutes in after ages, to take any notice of them would not only exceed the plan of the work, but very often anticipate the materials which are to contribute towards the subsequent parts of the History.

The text of our old statutes was translated in the time of Henry VIII. The ear of a lawyer, by long use and frequent quotation, has been so familiarised to the language of this translation, that it has obtained in some measure the credit of an original. Conformably with the general deference paid to this translation, I have mostly followed the words of it, except where I found it deviated from the text, or the matter required to be treated more closely or more paraphrastically.

There is one point of juridical history which has been greatly misconceived by many. It has been apprehended that much light might be thrown on our statutes by the civil history of the times in which they were made; but it will be found on inquiry that these expectations are rarely satisfied (*a*). The *lay* historians, like

(*a*) Here, it is obvious, the author can hardly have fully appreciated the bearing of history upon law. No doubt it rarely happens that we have any account of the actual debates or discussions upon a law, and it is surprising, for instance, what little attention the contemporary chroniclers seem to have given to the Great Charter. But it was not the less clear that the only true exposition of that or any other ancient law is to be found in the history of the times immediately preceding it. As to *modern* law, indeed, what the author says may be true, that the only proper exposition is to be sought in the previous laws on the same subject; but that is because there is always a body of previous law, which affords the most apt exposition of the new law. It is otherwise with ancient laws, which are enacted *de novo*, and are very *general*, and of which the only possible exposition is to be found in the facts of contemporary history. Had the author read the chronicles of the times previous to the Great Charter, he would have observed this; and not failed to apply the maxim of Montesquieu, "*Il faut éclairer les lois par l'histoire, et l'histoire par les lois.*" To fail to appreciate the bearing of history upon law, is to fail to realise the true idea of *history*, as applied to law.

the body of the people, were as unconcerned in the great revolutions of legal learning in those days as in ours; and we now see a statute for enclosing a common, or erecting a workhouse, make no small figure in the debates of parliament; while an act for the *amendment of the law*, in the most material instances, slides through in silence. Yet the latter would become an important fact to the juridical historian, while the former was passed by unnoticed. I believe little is to be acquired by travelling out of the record—I mean out of the statutes and Year-Books, the parliament-rolls, and law-tracts.

The following History, to the end of Edward I., was published in one volume in quarto, in March 1783; the remainder, as far as the end of Henry VII., in March 1784. These two volumes have undergone a revision, and have received some considerable additions. I have also subjoined the reigns of Henry VIII., Edward VI., and Queen Mary, or, as it is more properly styled by lawyers, Philip and Mary (*a*). This brings us to the close of that period, which appears to be almost wholly abandoned to the researches of the juridical historian. We have passed the times of the Year-Books and of their appendages, Fitzherbert and Brooke, the manuals of practisers in former times; we have even touched on those materials, to which the practisers of the present day do not disclaim to owe obligations. Dyer and Plowden stand among the earliest of those authorities that are vouched in Bacon, in Viner, and in Comyns, who rarely refer to any antecedent to the reign of Elizabeth (*b*).

At this juncture in our legal annals, between the law of former days and that of the present, we may be permitted to pause for a while. A new order of things seems to commence with the reign of Elizabeth, which strikes the imagination as a favourable point of time for resuming this historical inquiry afresh.

In pursuing the changes in our laws thus far, it is hoped, that if nothing is added to the stock of professional information, something is done towards giving it such illustration and novelty as may assist the early inquiries of the student. The investigation here made into the origin of English tenures, the law of real property, the nature of writs, and the ancient and more simple practice of

(*a*) The author's first work stopped there; but he subsequently, after a long interval, added a fifth volume on the reign of Elizabeth, and he never went farther. He died, indeed, soon afterwards.

(*b*) And therefore, as a history of our older law, the work, as far as it went, was a complete one; for undoubtedly, at the end of the reign of Elizabeth our laws had reached a point of development at which they assumed an entirely new character, and started, so to speak, in a course of improvement, interrupted no doubt by the troubles of the Rebellion and the Revolution, but resumed and continued from the Revolution to the present period, from the reign of Anne to the reign of Victoria. The present work displays the origin of the laws thus developed, and their progress up to that period when their character was about to alter altogether, and assume the modern aspect. The work, therefore, is, in that sense, a complete work, as a history of the law to the end of the reign of Elizabeth; that is to say, a history of our older law.

real actions, may perhaps facilitate the student's passage from *Blackstone's Commentaries* to *Coke upon Littleton*, and better qualify him to consider the many points of ancient law which are discussed in that learned work. J. R.

January 25, 1787 (a).

(a) In 1814 a fifth volume was published, without any further preface, bringing the law down to the end of the reign of Elizabeth; and that completes the present work. As originally published, it was to the reign of Elizabeth,—that is, to its commencement. The additional volume carried it to the end of that long reign, and so completed the history of our older law. At the end of that reign came the rise or dawn of modern law. At that era, the feudal system had become obsolete; villenage had disappeared (the last case of it occurred in that reign); the trial by battle was disused (the last actual instance of it also occurred in that reign); the old real actions were becoming superseded by the action of ejectment; for the ancient cumbrous remedies, actions on the case were substituted; our judicature and procedure began to assume something of their modern form; and altogether, a new era in our legal history commenced, which may be called the era of our modern law. A work or legal history, therefore, ending with the close of that reign, might well be deemed complete as a history of our older law. "With some exceptions," says our author, "it may be pronounced that the general cast of learning, in the days of Queen Elizabeth, comes within the help of that kind of law which is now in use. The long period of this reign gave sufficient opportunity for the discussion of almost every legal question; and the learning of former times being laid open to the world by the late publications, the whole of the law seems to have undergone a reconsideration, as it were, and those parts which were then mostly in use were settled upon principle, and so delivered down to succeeding times. To us, who view things in the retrospect, there seems to arise a new order of things about this time, when the law took almost a new face. When we consider Queen Elizabeth's reign in this light, it becomes a very interesting period in the history of our jurisprudence. From hence the commencement of modern law may be dated" (*Hist. Eng. Law*, c. xxxv., *post*, vol. iii.) That reign, therefore, fitly terminates the history of the "old law," and thus the author's work was complete. The reign of Elizabeth presents a junction between the old law and the modern. There is hardly any subject of the old law which did not either become obsolete in that reign, or was not superseded or modified by some statute of that reign—the basis of more modern legislation. Thus, the act 27 Eliz., as to the liability of the hundred for riots or robberies, founded on the ancient statute of hue and cry, became the basis of the modern act 8 Geo. II. c. xvi. The acts of Elizabeth remedy faults or defects not *substantial*, as pleading, or process became the basis of the act of Anne for the amendment of the law; which, in its turn, afforded a foundation for our more recent reforms in common law procedure. There is, indeed, no part of our law, however ancient or obsolete, which has not some connection, however remote, with the present. Thus, the ancient law as to the *essoins de ultra mare* shows that, at common law, a subject, although out of the realm, was liable to be sued in our courts—a principle affirmed also by the old statutes as to outlawry, and lately revived by the Common Law Procedure Act. Again, the statute 17 Edw. *de prerogativa Regis*, is deemed the basis of the jurisdiction exercised in Chancery over idiots or lunatics (2 *Inst.* 14; *Hume v. Burton*, 1 *Ridgway P. C.* 224; Lord Ely's case, *ib.* 519). The ancient writ of *ad quod damnum* formed the basis of the procedure in the Highway Act, 13 Geo. III., and the substance of it is preserved (*Davison v. Gill*, 1 *East*, 76). These are only a few illustrations whence may be seen the advantage of the study of the legal history even of that older age of our law which may be deemed to have concluded with the reign of Elizabeth. The history of that age, therefore, appears to form in itself a complete work; and with the history of the subsequent reigns, the history of modern law may be said to commence. It is the ambition and intention of the editor to continue the history to the present period. In the meantime, he has done his best in his notes to the last volume of the present work to bring the history of the law down to our own times.

## PREFACE TO THE PRESENT EDITION.

IN presenting a new edition of "Reeves' History of the English Law," the Editor desires briefly to explain the plan upon which it has been executed. In the first place, as the work was written the greater part of a century ago, since which time our ideas of legal history have much advanced, and our sources of information have been greatly enlarged, while the law has been so largely altered as to render the period covered by the history more remote and the law less applicable to the present than when the author wrote, the question arose whether it would not be necessary to re-write or remodel the work. On the whole, however, it has been thought better, for many reasons, to adhere to the author's text, and therefore it is preserved intact. But it has been necessary to insert a great number of notes, some of considerable length, in order to secure the advantages of later information and enlarged views of legal history. The principles which have governed the Editor have been, as far as possible, to exhibit the rise, the growth, and gradual progress of our laws and institutions; and especially to trace them from their earliest origin. This appeared to render necessary an Introductory Essay on the prevalence of the Roman law in this country, and on its influence in the formation of our own; the more so since our author himself, who had not entered into that subject, had in one of his notes<sup>1</sup> indicated some sense of its importance; and the great historian, Hallam, had distinctly suggested it.<sup>2</sup> Our author had entirely passed over the long period of the Roman occupation, during which the Roman laws and institutions were firmly rooted and established here; and he passed so cursorily over the Saxon period as not to have shown how little our laws had derived from the barbarians, and how much they must have owed to the Romans. It appeared, therefore,

<sup>1</sup> *Vide* vol. i., c. ii., p. 53.

<sup>2</sup> "Our common law may have indirectly received greater modification from the influence of Roman jurisprudence than its professors were ready to acknowledge, or even than they knew. A full view of this subject is still a desideratum in the history of English law, which it would illustrate in a very interesting manner" (*Middle Ages*, c. viii.)



proper to introduce the present edition by an essay on that subject; and, on the other hand, to supplement, in the notes, the account given by the author of the laws and institutions of the Saxon age.

For the sake of convenience, it seemed desirable to mould the whole work into three volumes, and the course of our legal history, during the period covered by the work, seemed to point to a three-fold division, and also to indicate very clearly the points of time at which the division should be made. From the Saxon era to the end of the reign of Henry III. marked clearly one distinct period; for with the accession of Edward I., as all our legal historians consider, commenced a new era in our legal history. With the reign of Edward I., therefore, begins the *second* division of our older legal history, the subject of the *second volume*. This period properly extends to the accession of the Tudor dynasty, because then again began an entirely new era in our legal history, ending with the reign of Elizabeth, which, as already seen, closed the duration of our older law, and heralded the dawn of modern law. Although the author's text has been preserved, his arrangement required to be altered. He had blended different and important reigns. Thus he had dealt with the whole of the long period from the Conquest to the reign of John under the same head, so as not to mark the reigns of Henry I. and Henry II.; and he had blended the two very distinct reigns of Henry VI. and Edward IV., and those, still more distinct, of Edward VI. and Mary. The Editor therefore, without having altered the text, has entitled some chapters differently, and, sometimes, transposed matter to the proper reign, so as to mark the distinctions between the more important eras; and he has done his best to keep up in the notes the continuity of the progress of our laws, and to fill up any deficiencies in the history. With regard to the notes, the object has been to afford as much as possible of *contemporary* illustration or explanation (a); the cardinal principle kept in view being that laid down by the author, to endeavour to look at the laws and institutions of any age by the light of the *ideas of that age*, and not to fall into the error of considering ancient institutions by the light of modern ideas.

(a) A distinguished jurist (Sir Roundell Palmer) has lately observed, in an address to law students, that our author was "valuable, though sometimes tedious," and it has been attempted, while illustrating the text, to render it more interesting and readable.

## INTRODUCTION TO THE PRESENT EDITION.

IN presenting a new Edition of this work, upon “the History of the English Law, from the time of the Saxons to the end of the Reign of Elizabeth;”—a work first published the better part of a century ago;—it may be proper to explain the ideas and principles upon which it has been undertaken, and the views of legal history upon which it has been supplemented or corrected; and upon which it has also been thought necessary to introduce it by some observations upon the Roman laws and institutions, and their influence upon the formation of our own.

It seems obvious that, in any work on legal history, as it is important, as far as possible, to trace laws and institutions to their real origin, however remote, it is necessary to go back to the period when regular laws and civilised institutions first existed in the country, because, however much its laws may have been (as in ours was certainly to a great extent the case) the growth of custom and usage, subject to change in course of time, yet it must be that the rise and growth of *civilised* customs and laws must have been mainly influenced and determined by the earliest civilised institutions existing in the country; the primitive source whence they were in all probability originally derived.

This must be more especially the case in a country which, as was the case with our own, was still in a state of barbarism,<sup>1</sup> con-

<sup>1</sup> That the Britons were in a state of barbarism on the arrival of the Romans is clear from the pages of Cæsar, de Bell. Gall., lib. iv., and Tacitus, in Vit. Agric., and it is idle and absurd to talk of their “laws.” Montesquieu truly says: “Du temps des Romains, les peuples du nord de l’Europe vivaient sans arts, sans education, presque sans lois (*De l’Esprit des Loix*, liv. xiv. c. 3); and he observes, “C’est le partage des terres qui grossit principalement le code civil; chez les nations où l’on n’aura pas fait ce partage, il y aura, très peu de lois civiles. On peut appeler les institutions de ces peuples des mœurs plutôt que des lois” (l. xviii. c. 13). Sir J. Mackintosh, in his history, describes the inhabitants of the country at the time of the arrival of the Romans as in a state of barbarism. He points out that they grew no corn, and says

quered by a nation, like the Romans, in possession of a most complete and comprehensive system of government, and was for centuries subject to their rule—a portion of the Roman empire,<sup>1</sup> living under the Roman laws and institutions, and becoming first civilised under their influence.

It was the peculiar boast of the Roman emperors who first consolidated and codified the Roman laws<sup>2</sup> that they governed the various provinces of their vast empire not merely by force, but by the influence of their rule, and that they not only subdued the barbarians by their power, but civilised them by their law.

It was a law, in its nature so comprehensive, and based upon right reason and general principle, that it was not the law of one state only, it was the law of nature and of nations,<sup>3</sup> fitted by its

“It is vain to inquire into forms of government prevalent among a people in so low a state of culture. The application of the terms which denote civilised institutions to the confused jumble of usages and traditions, which gradually acquire some ascendancy over savages, is a practice full of fallacy. It is an abuse of terms to bestow the name of government on such a state of society” (*Hist. Eng. c. i.*)

<sup>1</sup> The empire was divided into dioceses, under vicars (representing the Prætorian prefect), and these into provinces, under presidents or proconsuls. One of the dioceses was Britain, and it was divided into five provinces. “Vicarius pro præfecto prætorio mittebatur in tractum vel diocesim aliquam aliquot in se provincias continentem. Diocesis Thraciæ, &c. Fuit etiam Romæ, Italiæ, Britannicæ, (singulis suberant quinque provinciæ)” (*Cod. Just., lib. i. tit. xxxviii. et xl. in notis*). As early as the reign of Caracalla, all the free subjects of the empire had the rights of Roman citizens. There were “comites,” or military commanders, but the vicars were supreme in civil matters. “In civilibus, causis vicarios comitibus militum convenit anteferre” (*Cod. Just., lib. i. tit. xxxviii. s. 1, De Officio Vicarii*). The proconsuls had legates, who could decide civil or criminal matters, subject, however, to revision by the proconsuls. “Legati non solum civiles sed etiam criminales causas audiant, ita ut si sententiam in reos ferendam providerint, ad proconsules eos transmittere non morentur” (*Cod. Just., lib. i. tit. xxxv., De Officio Proconsulis*). The greater part of the first book is taken up with edicts as to the functions and duties of the officers of the empire or the provinces, which show a most elaborate and comprehensive system of government, which must have spread its ramifications into every corner of the empire. From the *Notitia Imperii*, and from the old chronicle of Richard of Cirencester, it will be seen that the Roman rule extended over the whole country; that there were two “municipia,” nine “colonies,” and upwards of one hundred and twenty stations, comprising nearly all the chief towns and cities now existing.

<sup>2</sup> “Barbaricæ gentes, subjugata nostra, omnes vero populi legibus tam a nobis promulgatis, quam compositis, reguntur” (*Præm. Inst. Just.*) The Roman law was first codified under Theodosius, during the Roman rule in Britain, and the subsequent code of Justinian is of course mainly made up of edicts previous to the termination of that rule. The very object of the code was to gather up the imperial edicts, and render them available for all the numerous provinces of the empire, so far as they might be applicable, as almost all of them were, in point of principle.

<sup>3</sup> Thus it was said by a writer in the middle ages: “Jus Justiniani præscriptum libris, non civitatis tantum est, sed et Gentium et naturæ; et aptatum sic est ad naturam

character for universal dominion, for which reason, no sooner after the barbarian conquests did the barbarian races become civilised enough to be capable of law, than this great system of law had everywhere a resurrection and an ascendancy.

Such was so clearly the character of the Roman law, that it was recognised in the earliest ages of Christian history, and by none so clearly, none more emphatically, than by the first fathers of the Christian church,<sup>1</sup> and by natives of other races and distant countries subject to its rule. And it was the boast not only of the Romans, but the testimony of the most impartial writers, that the excellence of the Roman laws rendered them worthy of the admiration and adoption of other nations. Nor is it to be doubted that this opinion would be shared and followed by the prelates of the Christian church, who had so powerful an influence in the conversion and civilisation of the barbarian races.

The general character of the Roman law,<sup>2</sup> as expounded by its most distinguished professors, after the spread of the Christian religion, was largely in accordance with those great principles of justice and morality which are recognised by Christianity, and are, indeed, common to all men; and its character, as it would be seen administered in this country, under the auspices of some of its

universam, ut imperio extincto, ipsum jus diu sepultum surrexerit tamen, et in omnes se effuderit gentes humanas. Ergo et principibus stat, etsi est privatis conditum a Justiniano" (*Albericus Gentilis*, lib. i., *de Ju. Bell.*, cap. iii.)

<sup>1</sup> Thus St Augustine says: "His omnibus artibus tanquam vera via nisi sunt ad honores, imperium, gloriam; honorati sunt in omnibus ferè gentibus; imperii sui leges imposuerunt multis gentibus; hodieque literis et historia gloriosi sunt penè in omnibus gentibus" (*De Civit. Dei*, lib. v. c. xii.) Insomuch that he goes on to say: "Per populum Romanum placuit Deo terrarum orbem debellare, ut in unam societatem reipublicæ, legumque perductum longè latèque pacaret" (lib. xviii., *De Civit. Dei*, c. xxii.) St Augustine was a prelate of the African Church, and a perfectly impartial judge of the merits of the Roman law; and that opinion which he had of it would no doubt be followed by other prelates of the church, in this or any other country.

<sup>2</sup> "Justitiam colimus, et boni et æqui notitiam profitemur, æquum de iniquo separantes, licitum ab illicito discernentes, bonos non solum metu pœnarum, verum etiam præmiorum quoque exhortatione efficere cupientes; veram, nisi fallor, philosophiam non simulatam affectantes" (lib. i. *Dig. de Just. et Jur.*) This was the description justly given of it by one of its greatest professors, Ulpian, and another, even still greater—the illustrious Papinian, who was raised to the prefecture by the Emperor Severus in this country. It was Papinian who laid it down: "Quæ facta lædunt pretatem, existimationem, verecundiam nostram, et contra bonos mores fiunt, nec facere nos posse credendum est" (L. xv., *Co. de Condit. Inst.*) There is reason to believe that the later of the Roman jurists had felt the influence of the Christian morality. Tertullian says of the Romans: "Eorum leges ad innocentiam pergere, et de divina lege ut antiquiore, ferme mutuatus" (*Apol. Tert.*)

ablest professors, would be calculated, it may be conceived, to commend it to the reason and consciences of all, and to attract the respect, the confidence, and admiration of the barbarians among whom it was administered.<sup>1</sup>

The fundamental principles of the Roman law, as to the bases, or sources of law,<sup>2</sup> being broad, enlightened, and elastic, eminently adapted it for universal empire. It acknowledged a general law based upon principles common to all mankind, and yet leaving ample scope for national or municipal law; admitting the authority of custom as resting on consent, yet making custom subject to reason, and the local or private law subordinate to the general or public law; it was equally adapted to maintain imperial sway, and influence, and incorporate local usages.

It was well understood, by the oracles and expositors of the Roman law, that any good system of laws must contain in them some elements common to all nations,<sup>3</sup> though it was equally under-

<sup>1</sup> Thus it was a principle of the Roman law that that which long use sanctioned became law without being written, for long-prevailing customs become of the same nature as law by the consent of those who follow them (*Just.*, lib. i. tit. ii. s. 59). And hence it was supposed in the Roman law that the authority of custom sprang from consent; for what (it was asked) was the difference between the consent of the people, given by their votes, and their will, signified by their acts? (*Pand.*, lib. i. tit. iii., *De Legibus*, lib. xxxii. tit. xxxiii.)

<sup>2</sup> "Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo" (*Modestinus*, l. xl., *Dig. de Legib.*) And as the authority of custom was based upon consent, the foundation of all law, apart from actual necessity, would, upon the Roman principle, be consent. This head of law is appealed to in the Digest, lib. i. tit. iii. c. xcii., and it is thus that Ulpian expounds it: "De quibus causis scriptis legibus non utimur id custodire oportet, quod moribus et consuetudine inductum est. Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus, quod dicitur moribus constitutum; nam eum ipso leges nulla alia ex causa nos teneant, quam quod iudicio populi receptæ sunt: merito et ea quæ sine ullo scripto populus probavit tenebunt omnes; nam quod interest suffragis populus voluntatem suam declaret, an rebus ipsis et factis?" (*Ulpian*, lib. ii.) But, as St Augustine observes, who had well studied the Roman law: "Rei non bonæ consuetudo pessima est. Nemo consuetudinem rationi et veritati præponat" (lib. iii., *De Baptismo*, cited in the canon law, dist. viii. c. iv.) This consent, however, was presumed to be based upon reason and experience; the very argument assigned for not changing a custom without sufficient cause implied that there *might* be such cause. "In rebus novis constituendis evidens esse utilitas debet, ut recedatur ab eo jure quod diu æquum visum est" (*Ulpian*, lib. ii., *dig. de constit. princ.*) According to the wise teaching of the imperial law, precedent was not to be blindly adhered to contrary to principles. "Non enim si quid non bene derimatur, hoc et in aliorum iudicium vitium extendi oportet, cum non exemplis sed legibus iudicandum sit" (lib. xiii., *co. de sent. et inter leg. omn. jud.*), though it was recognised: "Rerum perpetuo similiter iudicatarum autoritas vim legis obtinet" (*Call.*, lib. xxxviii., *dig. de leg.*)

<sup>3</sup> "Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim com-

stood that the municipal law or custom of a state must, in some respects, add to or depart from that natural law, and this, indeed, was what formed the scope of civil or municipal law.<sup>1</sup>

In their development of law upon these fundamental principles, the Romans were eminently *progressive*, and open to the influence of new ideas and altered circumstances, so that, as observed by a very learned writer,<sup>2</sup> "the notion of a body of customary law, mainly unwritten, which was not abrogated, but was *evaded* or *amplified* by persons *acting under the ideas of later times*, is the notion which, above all others, must be embraced clearly by any one who wishes to understand the Roman law." It is manifest that a system of law so comprehensive and so expansive, so enlightened, so elastic, and so progressive, must have been eminently adapted to universal rule, and calculated for the government of subject races.

In accordance with these principles and these characteristics of the Roman law, the Roman policy towards subject or subjugated races, though at first exclusive, had become, during the Roman dominion in this country, extremely liberal and enlarged. The ideas of the Romans on this subject, as on all others,<sup>3</sup> advanced and expanded with the growth of their mighty empire, and at the very time when their dominion here had become firmly settled, their law had attained its highest development of excellence, and their policy towards their provincial subjects had reached the highest point of enlightenment.

That policy is thus described by the able and learned writer already quoted: "The conquest of Italy, and the gradual spread of the Roman conquest materially altered the character of the legal

*muni omnium hominum jure utuntur*" (*Gaius*, lib. ix. *dig. de Just. et Jur.*, et vide *Inst. de ju. nat. gen. et civ. Parag. 1*)

<sup>1</sup> "Lex municipalis, sive consuetudo, juri communi derogat; lex cujusque loci inspicienda est, sive scripta sit, sive non" (*Ga. Obs.*, lib. ii. obs. 124). "Jus civile est quod neque in totum à naturali jure, vel gentium, recedit, neque per omnia ei servit: itaque cum aliquid addimus vel detrahimus juri communi, jus proprium id est, civile, intelligimus" (*Ulpian*, lib. vi., *Dig. de Just. et Jur.*)

<sup>2</sup> Sandar's Introduction, p. 9. It is impossible adequately to express the obligations which the profession are under to the author of that most interesting and valuable work, which forms the best possible introduction to the study of our own law.

<sup>3</sup> The Theodosian code had been compiled. Ulpian and Papinian, the greatest of Roman jurists, had written upon it (and Papinian was appointed to the Præfecture by the Emperor Severus in this country), and it was in the same state in which it was when St Augustine, the greatest father of the Christian church, wrote upon it in the terms of eulogy already quoted.

system. A branch of law almost entirely new sprang up, which determined the different relations in which the conquered cities and nations were to stand with reference to Rome. As a general rule, and as compared with other nations of antiquity, Rome governed those whom she had vanquished with wisdom and moderation. Particular governors, indeed, abused their powers; but the policy of the state was not severe, and Rome connected herself with her subject allies by conceding them privileges proportionate to their importance or their services."

"The *jus Latinum*<sup>1</sup> and the *jus Italicum* are terms familiar to all readers of Roman history. The first expressed that, with various degrees of completeness, the rights of Roman citizens were accorded to the inhabitants of different towns, some having the

<sup>1</sup> The *jus Latinum* is not to be confounded with the *jus Italicum*. The latter was the privilege of towns, the former of individuals, and it was that which was extended by Caracalla to all the free inhabitants of the empire. What it was, and what it involved, may be seen expounded in an edict addressed by the Emperor Justinian to the Prætorian præfect (*Cod. Justin.* lib. vii. tit. 6, "De Latina Libertate tollenda, et per certos modos in civitatem Romanam transfusa"), in which may be seen that the *jus Latinum* did not carry with it full Roman citizenship. It may be premised that it was the *Lex Julia*, A. U. C. 404, which gave the right of Latinity—*jus Latii*, as it was called—to all free inhabitants, and the *Lex Junia* conferred it upon freed men. It was a question, it should seem, what precise privileges the *jus Latinum* conferred, and to this question the edict refers. The *Latini colonarii* mentioned by Ulpian were the provincial communities which had acquired the right of Latinity. The edict of Justinian, above quoted, relates to the *liberti*, the freed men, who, by the *lex Junia*, had the *jus Latinum* or *jus Latii* conferred upon them, and as to which difficulties had arisen—whence the edict recites: "Cum dediti liberti jam sublatis sint, ea propter imperfectam Latinorum libertas incertis vestigiis titubant. . . . quod autem ex re ipsa rationabile est, hoc in jus perfectum deducitur. Cum enim Latini liberti ad similitudinem antiquæ Latinitatis quæ in coloniis missa est, videntur esse introducti, ex qua nihil aliud reipublicæ nisi bellum accessit civile; satis absurdum est, ipsa origine res sublata, ejus imaginem derelinqui. Cum igitur multis modis et innumerabilibus Latinorum introducta est conditio, et leges diversæ introducta sunt, et ex his difficultates maximæ emergebant ex lege Junia," &c. And then it proceeds to prescribe modes by which the freed man "libertatem et civitatem Romanam habeat," which distinguishes the two rights, though not strongly. The great jurist, Ulpian, divided the inhabitants of the Roman empire into three classes, *cives*, *Latini*, and *peregrini*, or foreigners. The *civis* was entitled to every privilege of a Roman citizen; the *peregrinus* was excluded from all the rights arising from the peculiar character of the Roman law. He had not the *connubium* nor the *commercium*, but he had all that was recognised by the *jus gentium*. The *Latinus* stood between the *civis* and *peregrinus*; he had the *commercium*, and could hold property as Roman citizens could do, and could make testaments, but he had not the *connubium*. This is the inference Mr Phillimore draws from various passages in Ulpian, "Connubium habent cives Romani, cum civibus Romanis, cum Latinis autem, et peregrinis, ita si concessum sit" (tit. v. s. 4). "Mancipatio locum habet inter cives Romanos et Latinos colonarios, Latinosque Junianos, eos que peregrinos quibus commercium datum est" (tit. xix. s. 4).

*commercium* only, and some also the *connubium*. Towards the end of the Republic (A. U. C. 663), the *Lex Jurica* gave the full rights of citizenship to almost the whole of Italy. The *jus Italicum* expressed a certain amount of municipal independence, and exemption from taxation attached to different places on which the right was bestowed." <sup>1</sup>

During the Roman occupation of the country, while on the one hand the Roman law in the provinces was consolidated and improved under the auspices of the ablest of jurists,<sup>2</sup> on the other hand, all free subjects in the provinces were admitted to the rights of Roman citizens; and this came fully under the protection and under the influence of that law.

<sup>1</sup> "The citizens of some particular places in the provinces possessed the *jus Latinum*, and the *jus Italicum* was attached to certain privileged cities, but the provinces generally had no participation in either right. They were subject to a proconsul or proprætor, paid taxes to the treasury of Rome, and had as much of the law of Rome imposed upon them, and were made to conform as nearly to Roman political notions as their conquerors deemed expedient" (a). Caracalla, in A.D. 212, made all persons citizens who were subjects of the empire (b). And then all the free inhabitants of the civilised world were *cives*, and beyond were nothing but *barbari* and *hosti* (c).

<sup>2</sup> As early as the reign of Adrian, a great jurist, by order of the emperor, composed an edict (as it was called), drawn from the edicts of the *prætor peregrinus*: of the *ædiles* and the *edictum provinciale*. The edict thus composed became the rule of law in the provinces, and was a code of Roman law (*Phillimore's Study of the Roman Law*, p. 222). By the *Lex Julia*, "De civitate sociis et Latinis danda" (A. 663), the freedom of the city was given to Latins and Italian allies who would accept it, "*qui ei legi fundi fieri vellent*" (*Cic. pro Balb.* 8); and this was afterwards extended to all the provincial subjects of the empire. And under Caracalla, in the early part of the third century, all the free subjects of the empire were admitted to the rights of free citizenship. At this time, too, be it observed, all free citizens had equal rights of citizenship. Long before the Roman conquest of Britain, the distinction between the two great ranks or orders of freemen had been done away with. In 309 A.U.C., the Cornelian law gave the *connubium* to the plebs, and the marriage of a patrician with a plebeian was no longer forbidden by law. And by the *lex Hortensia*, A.U.C. 467, the distinction between the two orders was really done away with, and the plebeian, by their law, acquired a full share in the *jus publicum*. The equality between the two orders was so complete, that the plebeian could be consul or prætor, and could administer justice. The effect of this all over the empire, especially when *provincials* were admitted to the privileges of citizenship, must have been to produce a great tendency to the amalgamation of all classes of society, and of Romans with natives. Previously to the above alteration of the law, no Roman citizen was permitted to marry a serf, a barbarian, or a foreigner, without special permission (*lib. xxxviii.* 36). "*Connubium et matrimonium inter cives; inter civem et peregrinæ conditiones hominum aut serviles non est connubium*" (*Bæth. in Cic.* 4). It may be observed, that the *jus Latii* or *Latinitas* was inferior to *jus civitatis* and superior to the *jus Italicum*; but the precise difference is a matter of dispute, and became immaterial after the law of Caracalla. Even plebeians might, after the above alteration, possess municipal privileges in the provinces (*Nieb. i.* p. 275).



There was nothing to which the Roman law attached more importance than to *status* and citizenship. The first great element of *status* was freedom; the next was citizenship; and the exposition of its privileges embraced all the most important relations and transactions of life. "The second great element of the *status* was citizenship. In the early times of Rome, the *cives* were members of the state: all beyond were *hostes* or *barbari*. But as civilisation progressed, the number of foreigners who resorted to Rome for trade, or were otherwise brought into friendly relations with the citizens, was so great, that they were looked upon as a distinct class—that of *peregrini*. A *peregrinus* was subject only to the *jus gentium*; citizens alone could claim the privileges of the *jus quiritium*. But when her conquests placed Rome in new and varying relations with the nations, an intermediate position between the citizen and the *peregrinus* was accorded to the more privileged of the vanquished. Some of the rights of the citizen were given to them, and some were withheld. These peculiar rights of the citizens were summed up in the familiar term *suffragium et honores*—the right of voting and the capacity of holding magisterial offices, and in the terms *connubium* and *commercium*. *Connubium* is a term which explains itself. The foundation of the Roman family was a marriage according to the *jus quiritium*, and not to have the *connubium* was to be incapable of entering into the Roman family system. In the word *commercium* were included the power of holding property, and of making contracts according to the Roman law; and also the *testamenti facti*, or power to make a will, and to accept property under one. By the *jus Latinum* and *jus Italicum*, various modifications of the rights implied in citizenship were granted: the one granted private rights to individuals, the latter gave public rights to towns. In course of time other shades between the *civis* and the *peregrinus* were introduced, but all distinction between them was gradually swept away by the recklessness with which the rights of citizenship were bestowed, until at last Caracalla made all the free subjects of the empire citizens, and thenceforth the days of *peregrini*, properly speaking, ceased to exist. All the inhabitants of the civilised world were *cives*, and beyond were only *barbari* and *hostes*" (*Sandar's Introduction to Justinian*, p. 30).

Such was the character of the Roman rule as it prevailed in this country for centuries<sup>1</sup> after the inhabitants had become subjugated

<sup>1</sup> Even in the course of the first century, this policy was civilising and influencing

to its power, and subject to its influence. And as they were undoubtedly mere barbarians when the Roman invasion took place, they would naturally, as they became civilised, adopt the laws and usages of those to whom they owed their civilisation.

That the Roman institutions were established and existed in this country for centuries is an historical fact, and those institutions, necessarily, embodied much of their laws. The Roman system, it is well known, was originally and essentially municipal<sup>1</sup>; and it need hardly be said that the municipal organisation was eminently complete; and when the provincial subjects of the empire were admitted, more or less, to the privileges of Roman citizens, and municipal colonies, or even *municipia*, with privileges like those of Rome, were established in the provinces, the municipal system in the provinces became the subject of constant and careful legislation.

And the whole system of Roman rule, which, on the one hand, by its general spirit of equity, justice, and wisdom, was likely to impress the mind of the barbarian nations subject to its sway, was, on the other hand, by its complete organization,<sup>2</sup> its municipal

the barbarian Britons; and there could not be a better picture of it than is presented in a passage from Tacitus, in his *Life of Agricola*. “Quibus rebus multe civitates quæ in illum diem ex æquo egerant, datis obsidibus, iram posuere: saluberrimus consilii absument, namque et homines dispersi ac rudes, eoque bello faciles, quieti et otio per voluptates assuescerent; hortari privatim, adjuvari publice, ut templa, fora, domus exstruerunt, laudando promptos, et castigando segues, ita honoris emulatio, pro necessitate erat. Jam vero principum filios liberalibus artibus erudire, et ingenia Britannorum studiis Gallorum anteferre; ut qui modo linguam Romanam abnuebant, eloquentiam concupiscerent, inde etiam habitus nostri honor et frequens toga,” &c. It is obvious that the barbarian race were already eagerly adopting the usages of Rome, and would readily adopt her laws. It may be imagined what progress they had made by the time of the edict of Caracalla, and what rapid progress in the amalgamation of the races and the adoption of the Roman institutions would be made after that edict. *Municipia* and *colonia* are alluded to by Tacitus in his *Life of Agricola* (v. 32), and they rapidly overspread the whole country, from York to Colchester, from Colchester to Exeter; as the *Itinerary* shows, coupled with the chronicle of Richard of Cirencester. That the Britons were barbarians when the Romans came, is clear from Cæsar and Tacitus, as already has been shown.

<sup>1</sup> The Roman law is full of provisions upon this subject. The parent city was, of course, the model of all other Roman municipalities (*vide Cod. Just.* lib. xii. tit. 13, “De decurialibus urbis Romanæ”); and under the municipal institutions there were other corporate bodies (*vide ibid.* tit. 14, “De privilegiis corporatorum urbis Romanæ”). When the provincials, under Caracalla, were made Roman citizens, the municipal offices were opened to them; and there is a large part of Roman law relating to the “*curia*” and the elections, and the functions of the “*curiales*” (*Cod. Just.* lib. x. tit. xxxi. “De decurionibus”). For instance, sec. 46, “De curialibus eligendis,” “ad subeunda patrio munera, dignissimi meritis et facultatibus curiales eligantur: ne tales forte nominentur qui functiones publicas implere non possint.”

<sup>2</sup> The Roman organisation was extremely elaborate. It has already been men-

institutions, and its rural colonisation, admirably fitted for the settlement and civilisation of a country in a state of barbarism; and calculated to fix itself very deeply and firmly in its social soil.

But the Roman system was not only municipal, it was also colonial;<sup>1</sup> and as the municipal system organised the inhabitants of towns, not only in civic but in other corporations, so the colonial system under which the municipalities themselves were established, extended itself from the towns into the country, and there established another organisation—rural in its nature.

The Roman system allowed grants of land by the state either to cities or colonies, or to individuals, and the latter in its development proved the parent of the manorial system. The Roman law in particular made special provision for the appropriation of waste or vacant lands by the “*curia*,” or corporations of the cities or colonies to which they appertained or belonged; the principle of the law being that, until such appropriation, the land remained the common property of all free citizens, but the exclusive property of none. And this, it is manifest, was a part of the law especially important in conquered countries such as Britain, where there would be vast tracts of territory vacant.<sup>2</sup>

tioned that Britain, like every other part of the empire was divided into provinces, of which there were five, under presidents or proconsuls; but there is every reason to believe that these were divided into smaller districts under the *comities* or counts; and thus the word *comitatus*, or county. Further, the Roman system of rural organisation included subdivisions into centuries and decennaries; and as these were found to exist among the Romanised Britons, it is reasonable to suppose they were derived from the Romans, especially as there is no trace of any Saxon law establishing them. As regards the municipal system of the Romans, it is hardly necessary to state how complete it was. But of the whole system of court government in the provinces, Guizot observes emphatically that it comprehended all things and all classes, that it had to do with all society, and all society with it. (*Lect. sur la Cécilez en France*, lect. ii.)

<sup>1</sup> The Roman system became colonial for the very reason that it was originally municipal. The Roman went forth from his city to conquer and cultivate the country, and hence the very term “colony” was derived from that which signified to cultivate, and the very definition of *coloni* was a body of people sent forth as planters with an allotment of land for their support. They had great privileges, and the Romans had a passion for the country. “*Existimamus meliore conditione esse coloniæ quam municipia*,” (*Gell.* xv. 13.) This system of course applied peculiarly to the provinces. (*Vide* Sigonius, “*de jure provinciarum*.”) The grants of land were either to the municipal bodies, or the colonies as corporate bodies; or afterwards by allotment to individuals; the principle was the same—it was a colonisation of the country with a view to its cultivation. The Roman provincial got a grant of land in the country, and built his villa, and had his “*coloni*” to cultivate the land.

<sup>2</sup> See, for instance, the heading of the *Code Just.*: “*De omni agro deserta*” (lib. xi. tit. lviii.), and especially the first section. “*Prædia deserta decurionibus loci cui*

With regard to allotments of land to individuals, the Roman system was primarily military in the provinces, and carefully defensive in its character. Hence, in all the conquered provinces, lands were assigned to soldiers, "milites" on military tenure, or on condition of military service: and this was especially so in the latter period of the Roman empire, during which the constant incursions of barbarians took place.<sup>1</sup>

When grants of public land were made to individuals—usually upon this military tenure, the holders had to allot a portion of it out to those who were the actual occupiers and cultivators, and who, although by the Roman law attached to the soil, and, in a sense, serfs, were not slaves, and soon acquired rights by custom.<sup>2</sup>

Although, therefore, originally the Roman system was municipal, yet as the empire was enlarged, and the system of colonisation was extended to the provinces, the Roman law, or legislation, extended its care to the condition of the rustic population; and the Roman legislation contained many provisions on the subject,<sup>3</sup> the general

subsunt, assignari debent." So s. 5. "Possidens prædia sterilia et fertilia, non potest retinere sterilibus, et fertilia retinere;" and, "Qui utilia reipublicæ loca possident, permixtione facta etiam deserta, suscipiant est ut si earum partium graventur accessu, quas antea per fastidium reliquerunt, cedant aliis curialibus qui utraque hac conditione retineant, ut prestatione salva cum desertis et culta possideant, sublata a paucis, quos iniquum est electa retinere cum municipes gravatura sit pars relicta."

<sup>1</sup> Agros etiam limitaneos universos cum paludibus . . . quos limitanei milites . . . ipsi curare . . . atque arare, consueverant ab his . . . detineri . . . volumus" (*Nov. Theod.*, tit. 32, vol. vi. p. 14). So Lampadius says, speaking of Alexander Severus, "Sola quæ de hostibus capta sunt limitaneis ducibus et militibus donavit ita ut eorum ita essent si hæredes eorum militarent" (p. 58). It is impossible not to see that though this may not have been the direct origin of the feudal system, still it contained the germ or principle of it, as it undoubtedly was military tenure, and this principle may have been imperfectly adopted by the Saxons; so as to occasion the controversy as to whether the feudal system was known among them as it afterwards was established by the Normans.

<sup>2</sup> The Roman would have his "villa," and around it the farm or land in his own personal occupation; but then, to secure the cultivation of the rest of the land for his support he would have to allot it out in portions to free labourers, called "coloni," attached to the soil, but not slaves. Hence villicus—a husbandman or farmer; the bailiff of a manor, or steward, even in the city. "Villicus agri colendi causa constitutus et appellatus à villa" (*Varr. R. i. 2*). "Villaris; of, or belonging to a village, farm, or country-house. Villanus, a farmer or villager, conditione colonariæ addictus" (*Bud.*) Hence the Anglo-Norman phrase "villein." Hence also the old English word, still remaining, "vill," or village. All these terms, be it noted, and the state of things they indicate, were well established when the Romans were here.

<sup>3</sup> *Cod. Theod.* lib. v. tit. 9, "De fugitivis colonis, inquilinis et servis;" tit. 10, "De inquilinis et colonis;" tit. 11, "Ne colonus in scio domino suum alienat," &c. *Cod. Just.* lib. xi. tit. 47, "De agricolis et censitis et colonis;" tit. 49, "In quibus

result of which is, that the *coloni* or actual cultivators of the soil were a species of free serfs attached to the soil, but not slaves.

The general principle pervading these laws was, that these "coloni," the actual tenants or occupiers of the lands belonging to an estate, were bound to render certain services to the lord connected with the cultivation of the soil, according to the custom of the estate;<sup>1</sup> and that, on the other hand, their services could not be increased or rendered more burdensome than they were by that custom—a principle which contained the germ of that customary tenure which was the essence of a manor.<sup>2</sup>

Numerous imperial edicts refer to these relations of lord and tenant in the manorial system. The fundamental principle of

*causis coloni censiti dominos accusare possint;*" tit. 50, 51, 52, "De colonis;" tit. 61, "De fugitivis colonis," &c.; tit. 67, "De agricolis et mancipiis dominicis," &c. So under the title of "Defensores," there is a special head, "De rusticis." The coloni, rustici, adscriptitii, &c., were serfs, not slaves. *Cod. Just. lib. xi. tit. 51*, "Licet conditione videantur ingenui, servi tamen terræ ipsius cui nati sunt, existimentur. Sed possessores eorum jure utantur, et patroni solitudine et domini potestate.

<sup>1</sup> "We must carefully distinguish between the domestic slaves and the prædial or rural slaves" (or serfs). "As to the former, their condition was nearly everywhere the same; but as to those who cultivated the soil, we find them designated by a variety of different names—coloni, rustici, agricolæ, tributarii, aratores, adscriptii, each name well-nigh indicating a difference of condition. Some were domestic slaves sent to a man's country estate to labour, while he lived there, instead of working indoors at his own home; some were regular serfs of the soil, who could not be sold except with the domain itself; others were farmers, who cultivated the ground in consideration of receiving half the produce; others farmers of a higher class, who paid a regular rent; others free labourers, who worked for wages. Sometimes these different denominations were mixed up under the general denomination of coloni" (Guizot, *Lect. sur la Civiliz. France*). Elsewhere, the same learned author identifies a class of these coloni as the originals of the villeins of a later age.

<sup>2</sup> Thus, as to the subject of the rights of rural settlers, and the coloni, or actual cultivators of the soil (*Cod. Just. lib. xi. tit. 47*, "De agricolis et colonis"). Thus, for instance, s. 5, "Quid dominus prædiorum præstatur?"—"Domini prædiorum id quod terra præstat, accipiant pecuniam, non requirunt, quam rustici optare non audent; nisi consuetudo prædii non exigat." So s. 2, "Si quis prædium vendere voluerit, retinere sibi transferendos ad alia loca colonos privata pactione non possit. Qui enim colonos utiles credunt; aut cum prædiis eos tenere debent, aut profuturos aliis derelinquere, si ipsi prædium sibi prodesse desperant." So the coloni were attached to the estate. But then, on the other hand, "Agricolarum alii quidem sunt adscriptitii, et eorum peculia dominus competunt; alii vero tempore annorum triginta, coloni fiunt, liberi manentes cum rebus suis; et ii etiam coguntur terram colere, et canonem præstare. Hoc et dominis et agricolis utilius est" (*Ibid.* s. 18). And again, "Omnes fugitivos adscriptios, vel colonos, ad antiquos penates, ubi censiti adque educati natiqque sunt, provinciis præsidentes redere compellant" (*Ibid.* s. 6). But the Roman law allowed them the benefit of custom (*vide* s. 23), and by the force of custom the coloni afterwards, under the name of villani, acquired full personal freedom, and a certain tenure of their land, and were converted into the modern copyholders.

copyhold tenure—that is, of holding according to custom, will be found laid down in the Roman edicts as to the coloni of the provinces ; who, on the one hand, were not allowed to usurp the land against the custom,<sup>1</sup> nor, on the other hand, were they allowed to be ousted, contrary to custom.

There can be no doubt that this important relation was established in the conquered provinces. Many of the imperial edicts issued into the provinces mention its existence, and show a strong desire to protect the interests of the provincials from the rapacity of the military,<sup>2</sup> and especially to protect the agriculturists ; whether the owners, or the coloni, the actual cultivators of the soil.

It was entirely in accordance with the spirit of the Roman law that these lords of manors should on their estates exercise a sort of domestic jurisdiction, and hence the origin of “ courts barons,” immemorial incidents to manors.<sup>3</sup>

These, however, were rather municipal or domestic institutions

<sup>1</sup> Thus an edict of Constantine : “ Si villa locata in emphyteusim conceditur non possunt coloni usurpare totum territorium ejusdem : ” — *Emphyteuticarios gravant coloni, agros præter consuetudinem usurpantes, quos nullis culturis erudierunt,*” &c. (*Cod. Just.*, lib. xi. tit. lxi.) So, again, “ Cognovimus à nonnullis qui patrimoniales fundos meruerunt, colonos antiquissimos perturbari, atque in eorum locum vel servos proprios, vel alios colonos surrogari ” (*Ibid.*)

<sup>2</sup> For instance, there is this edict of Theodosius and Honorius, addressed, “ Comitibus et magistris militum : ” “ Prata provincialium nostrorum, et precipue rei private nostre, perniciosum est militum molestia fatigari, ideoque lege ad amplissimam prefecturam promulgata, censemus, ne hoc deinceps usurpetur, super qua re universos quorum interest, convenire tua magnificentia non moretur neque permittat possessores vel colonos pratorum gratia qualibet importunitate vexari.” (*Cod. Just.*, lib. xi. tit. lx. s. 3).

<sup>3</sup> Lords had at first a domestic jurisdiction, in order to compel their tenants’ services, and maintain peace and order amongst them. Afterwards, in imitation of the sovereigns’ court, lords caused records to be made before their own officers of the transactions which had taken place in their courts (*Traites sur les Coutumes Anglo-Normandes*, par M. Howard, p. 507, tom. 1). This necessity of a domestic jurisdiction, recognised among the Normans, would no doubt have been equally recognised among the Romans, especially in the provinces. And this, no doubt, led to the establishment of local courts, not only in our great cities, such as London, and York, and Bath, and Bristol, and Cambridge, and Oxford, and Chester, and Exeter, but in places which now are, and always have been, so far as is known, mere villages, such as Dunster in Somersetshire, or Stratton in Cornwall (*Cro. C.* 259), and numerous other similar places to be found mentioned in the old reports. A court-baron is incident to a manor (*Bro. Abr.* “ *Court-Baron*,” pl. 1), and cannot be separated from it (*Bro. Abr.* “ *Incidents*,” pl. 34). So that if the manors are of Roman origin, the courts must be, and so of the court-leet, the court of the hundred or manor, “ the most ancient court in the realm ” (*Y.-B.*, Hen. 6). The ancient style of the court-baron was : “ Curia de milite, secundum consuetudinem villæ ” (2 *Inst.*)

of the Romans, which, it is manifest, were established here by the Romans. There were political institutions or divisions of a country, which, in all probability would be established or originated by them in any country subjugated by them, as it was a characteristic of their system of government to establish an organisation as complete as possible. As they had the large territorial divisions under greater rulers,<sup>1</sup> so they had smaller divisions, under lesser rulers; and thus they had a division into centuries and decennaries.

The various officers or functionaries at the head of these different divisions of a county were expected and directed to govern according to the Roman law.<sup>2</sup> And even the governors of provinces were strictly directed not to be satisfied to make the decisions in Rome their guides, but to determine always according to justice and right. On the other hand, the law was firmly upheld and enforced among all classes of subjects. The great characteristic of the Roman system of rule was the one eminently fitted for the subjugation and civilisation of a barbarous race. Its fundamental principle was the supremacy of the sovereign power, and this was equally exemplified with reference to dominion over the land, or upholding the supremacy of law. So great was the care of the

<sup>1</sup> It has already been mentioned that the empire was divided into dioceses, and præfectures, and provinces, under vicars, and præfects, and presidents; and it appears also that there were "duces" and "comites" (*Cod. Just.* lib. xii. tit. 12, "De Comitibus qui provincias regunt"). The organisation was rendered as elaborate as possible for political and fiscal purposes. For political purposes, there was the division into centuries and decennaries. The division by centuries and decennaries was universally adopted in the Roman system, and it was not merely numerical or military, but it was also territorial or local, for it was applied to the land as well as to the people; and this is to be observed in distinguishing it from the numerical division into hundreds, which existed among some of the barbarians, as the Germans. That was purely military, and therefore only numerical. The Romans divided land by hundreds, "centenarius ager," and therefore, though at first a century contained a hundred citizens, it did not afterwards. This also is to be observed, that, as it would be only the free citizens who could be included in the centuries, and the head of each household would be numbered, it would virtually be an enumeration of households or residences, and, in the country, of estates or manors.

<sup>2</sup> Thus, the governors of provinces were directed to govern according to law and right, not regarding even decisions at Rome which appeared contrary thereto. "Licet is qui provinciæ præest, omnium Romæ magistratuum vice et officio fungi debeat, nec tamen spectandum est quod Romæ factum est, quam quid fieri debet" (lib. xii., *Dig. De off. Præsid.*) Justinian gave the reason: "Non enim si quid non bene derimatur, hoc et in aliorum iudicium vitium extendi oportet, cum non exemplis, sed legibus iudicandum sit" (lib. xiii., *Co. de Sent.*) Again: "Universi omnino ex comitibus, vel ex præsidibus, qui suffragio perceperint, dignitates civilibus oneribus mueribusque teneantur, adstricti, ne commoda publica cum umbratili suffragiorum pactione lacerentur" (*Cod. Just.* lib. x. tit. 63, *De Legationibus*).

Roman law to discourage all violence, even for the vindication of right, as unbecoming a well-governed and civilised state, that there was a special law against it;<sup>1</sup> and if any one was turned out of possession of land or immovable property, he might obtain immediate restitution by a summary process of law, even though he had not the strict legal right of property, as against him who expelled him. It was a first principle of the Roman law to uphold the supremacy of law as a means of redress for injury or wrong,<sup>2</sup> and to treat as a serious offence against the state any recourse to force or arms for that purpose. But while, in accordance with this principle, the Roman law deemed it the first duty of the state to repress violence, it deemed it its next and not less sacred duty to administer justice.

Upon all matters which could be the subject of civil rights or claims in a civilised country, the Roman law made ample provision. Thus, all matters relating to the origin, the succession, or the transfer of property in lands, were the subject of careful and copious regulations. As to the creation of property in land,<sup>3</sup> its provisions were, from the position of the parent city, peculiarly applicable to

<sup>1</sup> The *Lex Julia, de vi*. It was provided by an imperial edict that any one placing himself forcibly in possession of that which is his, shall forfeit the property; and that, if it be not his, he shall pay the value, and restore the land to the person wronged. And persons so offending are also liable to the *Lex Julia, de vi*, and are held guilty of *vis privata*, if unarmed, and *vis publica*, if they use any other means or weapons of offence beside their own bodies (*Cod. lib. viii. tit. iv. lib. v. 7*).

<sup>2</sup> "Recuperandæ possessiones causa solet interdicti si quis ex possessione fundi vel ædium vi dejectus fuerit; nam ei proponitur interdictum unde vi per quod is qui deiecit, cogitur ei restituere possessionem, licet is ab eo qui vi deiecit, vi clam precario possideat. Sed ex constitutionibus sacris (ut supra diximus), si quis rem per vim occupaverit. Si quidem in bonis ejus est domino ejus privatur; si aliena, post ejus restitutionem rei dare vim passo compellitur. Qui autem aliquem de possessione per vim deiecit tenetur lege Julia de vi privata aut de si publica. Sed de vi privata si sine armis vim facerit. Sin autem armis enim de possessione vi expulerit de vi publica tenetur. Armorum autem appellatione non solum scuta et gladios, sed et fustes et lapides" (*Inst. Just. lib. iv. tit. 15*, which is copied into the *Mirror*).

<sup>3</sup> It was a first principle of the Roman law that the property in land must emanate from the state, and as the Romans acquired land by conquest, the Roman people were the lords of the soil. In foreign countries, however, the former owners were usually left, to a large extent, in occupation, but there were extensive tracts of land which were taken into the hands of the state, and called *ager publicus*. These were deemed the joint property of all Roman citizens, but until a division or appropriation under the authority of the state, no one had an exclusive right of property therein. Colonies were sent out to foreign countries to found or occupy cities, and to these a proportion of the land was allotted (*Nieb. i. p. 256, ii. p. 42*). Public lands were also let out to persons who paid a tenth part of the produce as rent, whence they were called *decennarii*, and these lands *agri decennarii* (*Cic. Verr. 52*).



the condition of a conquered country, as it admitted of the original inhabitants retaining possession as tributaries to the conquerors.

The descent of land was regulated upon the principles of equality or equity which pervaded the Roman law, and in the absence of a will, the land was divided among the children or other heirs;<sup>1</sup> while, on the other hand, the owner was not permitted to leave away from his family the whole of his property, but was obliged to leave them a reasonable part. The rules of descent were all carefully fixed and defined.

The right of testament was one of the privileges of Roman citizenship, and all that related to it was carefully regulated. With regard to the important subject of the authentication of testaments or wills, ample provision was made, in a system of public registry, which other nations, and ourselves among them, have doubtless derived from the Romans.<sup>2</sup>

So with respect to the various kinds of donation, and, among others, *donatio mortis causa*; and as to all matters of contract, whether as to realty or personalty, and, among others, the contracts of lease of real property, or loan of personalty; so as to prescription, and the rights acquired thereby, whether of property, or of "servitudes" over property.<sup>3</sup> In short, upon all the multitudinous affairs and transactions of life there were copious provisions in the Roman law, sufficient for the regulation of any civilised community, and which, so soon as a community became civilised, must necessarily

<sup>1</sup> By the law of the Twelve Tables, the succession of one who died intestate was vested in the "heredes" i.e., "liberi, aut qui in liberorum loco sunt." In later times, the sons seem to have divided the estate. And by the Falcidian law, the owner could not make a will unless he left to near relatives, "liberis et parentibus," a portion—"pars legitima," or reasonable part—which the law fixed at a fourth.

<sup>2</sup> There were two constitutions of Arcadius, and Honorius, and Theodosius, which show that, among the Romans, there was an authentication of testaments by means of registration in the office of a civil functionary, or among the records of the court of justice, or of a municipium (*Cod. lib. vi. tit. 23, De Test. i. 17*). It also appears from a later law that the registration of wills was transferred to the præsides in the provinces (*Ibid.*), and thus the magistrate not only registered the instrument, but authenticated it with his seal, upon the faith of the depositions of the subscribing witnesses. From this, no doubt, the probate of wills was derived, and it is not difficult to divine how it came into the ecclesiastical courts, or, in some instances of special custom, into courts of lords of manors. Under the Roman law, as the magistrates were educated, the registry could be entrusted to them, and therefore the claims of the clergy to the registry were rejected (*Cod. lib. vi. tit. xxiii. l. 23*).

<sup>3</sup> The titles of law above mentioned, and indeed almost every head of law that could be mentioned, were of Roman origin, and will be found copiously expounded in the codes and digests, and *nowhere else*, in that age. Nothing is more clear than that in Europe there were only barbarous usages beyond the limits of Roman law.

have become insensibly introduced and incorporated in their everyday usages, and thus at last converted into law, more especially when constantly illustrated and enforced under an admirable administration of justice.

Thus, therefore, there was an admirable system of law, and there was an equally admirable system for the administration of justice.

In nothing was the Roman law more certain to commend itself to the admiration and adoption of barbarians than in what related to the general administration of justice, whether civil or criminal. Every one knows that the most barbarian nations have the sense or feeling of justice, but with them it is only a sense or feeling, and the modes they adopt to secure justice are always rude and ignorant. Justice, to be certain, must have a fixed procedure,<sup>1</sup> founded upon rules and principles, and be raised from a mere impulse into a science; and in the Roman law it was raised into a science, and developed into a system.

In civil or criminal cases the Roman law, above all, had a rational system of trial by sworn judges; while, in criminal cases, it required clear proof,<sup>2</sup> and its maxims were marked by great mildness, mercy, and humanity, strongly contrasting with the rude and savage character of criminal justice among the barbarians, and likely to arrest their attention and attract their imitation.

Upon this subject, and especially with reference to foreigners, or foreign subjects, a learned writer already quoted says:—"The changes wrought by intercourse with foreign nations, and the new duties of extended dominion, produced a corresponding change in

<sup>1</sup> In nothing was the Roman law more remarkable than in the importance it attached to procedure, the practical part of law, the actual means and processes by which justice is obtained and administered. The Roman law provided a remedy for every injury, and a proper procedure for every remedy. It gave civil actions by way of obtaining compensation; it had a rational system of procedure, under which the questions in dispute were first ascertained, and then, if there was any fact in dispute, they were remitted to a rational trial by sworn judges, upon sworn evidence, and the parties could examine each other as witnesses.

<sup>2</sup> There was an imperial edict to the effect that prosecutors must be prepared with proper proof. "Sciant cuncti accusatores eam se rem deferre in publicam notionem debere, quæ munita sit idoneis testibus: vel instructa apertissimis documentis vel indicis, ad probationem indubitatis, et luce clarioribus expedita" (l. xxv., *de probat.*) And the Roman criminal law was full of humane maxims, some of which have passed into our own, as those well known ones, that it is proper to give the accused the benefit of a doubt, and that it is better that the guilty should escape than the innocent be condemned. "Semper in dubiis benigniora præferenda sunt:" "Satius est impunitum manere facinus nocentis quam innocentem condemnare" (*Dig. de Reg. Ju.*, l. lvi. l. clviii.)

the mode in which justice was administered. At home, the prætors, and in the provinces, the præsides, or præfects, who held *conventus* or assizes in the principal towns at stated intervals, sat as magistrates. As *judices*,<sup>1</sup> there were in certain cases the *recuperatores*, in others the *centumviri*, but principally those citizens whose names appeared in the yearly list drawn up by the prætor”<sup>2</sup> (*Sandar’s Introduc. to Institutes*, p. 23). The same learned author thus explains the Roman system of administration of justice, which deserves attention, from its having been the foundation of our own : —“In enforcing rights, two very different functions have to be exercised by those to whom the powers of the state are delegated. First, there must be some one invested with magisterial authority, giving the sanction and solemnity of his position to the whole proceeding, and who shall represent the law, and say what the law is, and who shall have power to employ the force which the state places at the disposal of those whom it selects to administer justice. Secondly, an inquiry has to be made into particular facts, evidence has to be received and weighed, and an opinion formed and pronounced as to the real merits of the case. The person who exercised the one function was spoken of by the Romans as *magistratus* : the person who exercised the other, as *judex*. To the law, represented, pronounced, and vindicated by the magistrate, they applied the term *jus* : to the examination of contested facts by the judge, the term *judicium*. Among the Romans, the *magistratus* was a different person from the *judex* until the introduction of the system of *extraordinaria judicia*. The two functions were kept almost entirely apart, and from a comparatively early period of Roman history the notion of a judge distinct from the magistrate was familiar to the national mind. First the consuls, then the *prætor*, and in some cases the *ædiles*, acted as magistrates. As *judex*, any member of the senatorial body could act when chosen by mutual consent of the parties, or, if they could not agree, by lot. There was also a standing body of judges—the *centumviri*, elected annually by the *comitia*. Lastly, in cases where the interests of *peregrini* were involved, the *recuperatores* furnished the body who were to act as *judices*.”<sup>3</sup> There therefore was trial by jury, and regular jury-lists—that is, lists of those qualified to act

<sup>1</sup> That is, *judices facti*, as Bracton calls the jury.

<sup>2</sup> The resemblance between this and the jury-lists will be apparent.

<sup>3</sup> That is, *judices facti*, as the jurors were called in Bracton.

as "*judices facti*," as jurors are called in our law. It is true that in the course of the Roman occupation this system of trial was departed from, in consequence of the spread of that system of despotism<sup>1</sup> which probably more than anything else undermined the strength of the Roman empire,<sup>2</sup> but it was never altogether destroyed.

The administration of the Roman government in the provinces was, as Montesquieu says, absolute, but there were, as Guizot points out, some great exceptions and some great qualifications. The præfects, prætors, or governors, had the whole civil and criminal jurisdiction in their hands, with this exception, that in the towns which possessed the municipal privileges of Roman citizens, the right of administering justice to the citizens, at least in civil matters, appertained to municipal magistrates, elected by the

<sup>1</sup> The same learned writer says: "In the later period of the Roman system of civil process, the summary jurisdiction was the only jurisdiction the magistrate exercised; the magistrate and the judge were the same person. By a constitution, published in A.D. 294, Diocletian directed all magistrates in the provinces to decide causes themselves, and the practice was in course of time extended throughout the whole of the empire" (*Sandars's Introd.*, p. 71). This extraordinary jurisdiction, which at first was only exercised either for restitution, or for the execution of judgments or sentences of judges, was, the learned writer thinks, extended by that edict to all cases. This the writer ventures to doubt. See, on this subject, the next note.

<sup>2</sup> The edict by which this was done was this: "Placet nobis, præsidēs de his causis in quibus, quod ipsi non possent cognoscere, ante hæc pedaneos iudices dabant, notionis suæ examen adhibere, ita, tamen, ut, si vel propter occupationes publicas, vel propter causarum multitudinem omnia hujus modi negotia non potuerint cognoscere, iudices dandi habeant potestatem. Quod non ita accipi convenit, ut in his etiam causis, in quibus solebant ex officio suo cognoscere, dandi iudices licentia eis permissa credatur: quod usque adeo in præsidum cognitione retinendum est, ut eorum judicia non deminuta videantur; dum tamen de ingenuitate super qua poterant etiam ante cognoscere, et de libertinitate præsidēs ipsi dejudicent—A.D. 305" (*Cod. Just.*, lib. iii. tit. iii. s. 2). The comment is: "Pedanei iudices quasi plano pede aut stantes iudicabant, non pro tribunali aut sedentes, imo collatitio aut fortuito scamno vel cespite. Pedaneis singulæ causæ cognoscendæ a magistratibus delegabantur, cognitionem habuerunt, non jurisdictionem." After the above edict, however, another issued: "In quibus causas præsidēs possunt iudices dare." "Quædam sunt negotia in quibus superficium est moderatorem expectare provinciæ: ideoque pedaneos iudices (hoc est qui negotia humiliora disceptant) constituendi damus præsidibus potestatem: datum A.D. 362" (*Ibid.* s. 5). The decree seems limited to the *iudices pedanei*, a species of inferior judges, or rather delegated arbitrators, so called, "vel quod non vehantur curru, sed pedibus proficiscantur in forum, vel quod iudicantes in uno loco considerent, ubi magistratus subsellia pedum habebant, vel quia pede plano iudicarent, non pro tribunali" (*Cujacius*). The edict abolishing reference to these judges can hardly be deemed an abolition of the office of *iudex*, nor does it appear to have been so considered by other eminent writers on the subject. Moreover, the reader must observe the *date* of the edict, which was not until the system had been established in this country above two centuries.

citizens themselves. And, next, there was, as regarded those who had the privileges of Roman citizens in the provinces, the benefit of a regular system of judicature, and a settled administration of justice, by skilled judges and sworn jurors. It is this which is the essence of our own system of judicature, and it is of Roman origin.

Nor was this all. There was an intelligent and effective system of procedure. It was a first principle of the Roman law in the administration of justice that it was in vain to proceed to a trial until the question in dispute was ascertained and defined,<sup>1</sup> a principle the result of reason, instructed by experience, which would not suggest itself to the untutored and unlettered minds of barbarians.

Guizot thus describes the system: "He to whom the jurisdiction appertained, prætor, provincial governor, or municipal magistrate, on a case being submitted to him, merely determined the rule of law, the legal principle according to which it ought to be adjudged. He decided, that is to say, the question of law involved in the case, and then appointed a private citizen, called the *judex*, the veritable juror, to examine and decide the question of fact. The legal principle laid down by the magistrate was applied to the fact found by the *judex*, and so the case was determined" (*Lect. sur la Civiliz. en France*, Lect. ii.) Thus the principle of the Roman system was the separation of the law from the fact, which is essential to anything like a science of law, or any regular procedure.

The system of trial under the Roman law<sup>2</sup> was the original of trial by jury, with which, in all essential respects, it was identical. The essence of it was trial by sworn judges taken from the people, and open to objection by either party. And in criminal cases

<sup>1</sup> "Res in judicium deducta non videtur, si tantum postulatio simplex celebrata sit, vel actionis species ante judicium reo cognita. Inter litem enim contestatam et editam actionem permultum interest. Lis enim tunc contestata videtur, cum *judex* per narrationem negotii, causam audire cæperit" (*Cod. Just.*, lib. iii. tit. ix., de *litis contestatione*). The *litis contestatio* marked the time when the suit was deemed to have really commenced.

<sup>2</sup> Montesquieu thus describes it: "Chaque année le préteur formait une liste, ou tableau de ceux qu'il choisissait pour faire la fonction de juges pendant l'année de sa magistrature. On en prenait le nombre suffisant pour chaque affaire. Ce se pratique à peu près de même en Angleterre. Et ce qui était très favorable à la liberté c'est que le préteur prenait les juges du consentement des parties. Le grand nombre des recusations qui l'on peut faire aujourd'hui en Angleterre revient à peu près à cet usage. Ces juges ne decidaient que des questions de fait, par exemple si une somme avait été payée ou non, si une action avait été commise ou non, mais pour les questions de droit, comme elles demandaient une certaine capacité, elles étaient portées au tribunal des centumviri. Les rois se réservèrent le jugement des affaires criminelles, et les consuls leur succédèrent en cela. Cela fit faire la loi

which were capital, there could be no sentence without an appeal to the people.

Another eminent writer on the subject says, "And the distinction between the *magistratus*, the person under whose jurisdiction a particular cause arose, and particular parties contended—and the judge or judges to whom the investigation of the facts in dispute was referred, is to be traced throughout the changes of Roman jurisprudence. The duty of the magistrate in matters of contentious jurisdictions, was to conduct the preliminary proceedings, to ascertain the points really in dispute between the parties, to instruct the judges, and sanction their appointment" (*Phillimore's Introduc. to Roman Law*, 19). When the question was ascertained, then it would be remitted for trial (*a*). In short, under the Roman system, there were the *judices legis* and *judices facti*, who answered to our jurors. And in criminal matters, it was a fundamental principle of Roman law that a free citizen could not be condemned without the judgment of his fellow-citizens.

At all events, trial by jury, so often supposed to be essentially of English origin, was part of the Roman system. It has been well said by a learned and talented writer, whose untimely loss in this country all lovers of learning and genius deeply deplore, "It is hardly possible to conceive a stronger proof of that ignorance of the most ordinary topics connected with general jurisprudence which has been so long the characteristic of the most eminent lawyers in this country, than the notion so vehemently entertained and so popularly received, that the jury is of peculiarly English origin. The principle and essence of a jury—which involves the selection of judges unknown beforehand from a particular body, and gives to those judges the power of deciding, with certain restrictions, and under the direction of certain rules, on the question in dispute—is to be found in the institutions of many other coun-

Valerienne, qui permet d'appeler au peuple de toutes les ordonnances des consuls qui mettraient en peril la vie d'un citoyen. Les consuls ne purent plus prononcer une peine capitale contre un citoyen romain que par la volonté du peuple" (*De l'Esprit des Loïs*, l. xi. c. 18).

(*a*) "Quas actiones, ne populus prout vellet, institueret, certas solemnesque esse voluerunt" (*Dig. de orig. Jur. leg. ii. sec. 6*). The object was, to fix the question. "Les Romains introduisirent des formules d'actions, et établirent la nécessité de diriger chaque affaire par l'action qui lui était propre. Cela était nécessaire dans leur manière de juger ; il fallait fixer l'état de la question, pour que le peuple l'eut toujours devant les yeux. Autrement, dans le cours d'une grande affaire, cet état de la question changerait continuellement, et on ne le reconnaitrait plus" (*Montesquieu, de l'Esprit des Loïs*, l. vi. c. 4).

tries. The trial of a citizen by other citizens and a judicial authority, in causes civil as well as criminal, inherent in every freeman, was the corner-stone of the Athenian constitution, and was thence restored to the Roman" (*Phillimore's Intro. to Roman Law*, p. 17).

The Roman law treated very carefully the functions and duties of the magistrates or officers to whom were entrusted the exercise of criminal jurisdiction in the provinces of the empire,<sup>1</sup> which was subject to supreme control; and, when allowed to be exercised by delegates, was in cases of conviction submitted to the revision of the superior ruler. And, more particularly, in the Roman law are to be found all the principles of a just and intelligent system of criminal procedure; a fair opportunity for defence, and a just examination into the truth.<sup>2</sup>

It cannot but be observed that a just and rational system such as this was well calculated to attract the respect and confidence of provincial subjects among whom it was established; and all who were Roman citizens were entitled to the benefit of it. But, further, so well fitted for imperial sway was the Roman law, that it made careful provision for the administration of justice, not only as between Roman citizens, or foreign subjects entitled to the rights and privileges of Roman citizens, but also as between them and foreigners, or foreign subjects, not entitled to those privileges. And this jurisdiction was found so excellent, that it was afterwards adopted for the whole body of the Roman citizens. "As there was intercourse, without community of law, between the Roman *civis* and the *peregrinus*, particular magistrates were required to adjust litigation that arose between them, and these were the *recuperatores*. It was usual for the Romans, in their treaties, to stipulate expressly that a tribunal should be constituted to determine the differences of individuals belonging to the foreign nation and to their own. The judges, therefore, were not to proceed according to the strict

<sup>1</sup> The pro-consuls had legates who could decide civil or criminal causes subject as to criminal sentences to the revision of the pro-consul. "Legati non solum civiles sed etiam criminales causas audiant, ita ut si sententiam in reos ferendam providerint ad pro-consules eos transmittere non morentur" (*Cod. Just. lib. i. tit. xxxv., de officio pro-consulis et legati*). This is an instance of the careful regulation of these offices.

<sup>2</sup> "Defensionis facultas danda est his quibus aliquam inquietudinem fiscus infert" (*Lib. 7, co. de Jur. fise.*) So Paulus: "Ne hi qui defendendi sunt subitis accusatorum criminibus opprimantur; quam vis defensionem quocunque tempore, postulante reo, negare non oportet; adeo ut propterea et differantur et proferantur custodiæ" (*L. 18, sec. 19, Dig. de Quest.*) "Sciant cuncti accusatores eam se rem deferre in publicam notationem debere, quæ munita sit idoneis testibus, vel instructa apertissimis documentis vel indiciis ad probationem indubitatis, et luce clarioribus expedita" (*L. 25, co. de probat.*).

rules of Roman law, but according to substantial equity. The *recuperatores* were not at first included in the list of judges between Roman citizens (*de curiæ judices*). The term was confined to those here mentioned, and to the judges in the provinces, who were called *peregrini recuperatores*, in the same sense as one of the prætors was called *peregrinus*. The proceeding before *recuperatores* was afterwards extended to the deputies of Roman citizens, and the matter was thus brought to a more speedy conclusion" (*Phillimore's Study of the Roman Law*, p. 30). Thus, therefore, the jurisdiction provided for foreign subjects was so good that it was afterwards adopted for citizens.

In order to provide every possible security against injustice, appeals<sup>1</sup> were allowed from the provinces to the supreme tribunal of the empire, and the appellate jurisdiction was protected by numerous edicts.

Nor was this all. For in every city there was special provision made, by means of a particular public officer,<sup>2</sup> for the protection of

<sup>1</sup> Thus, as to judicial functionaries in the provinces, and appeals allowed from them to the imperial city, there is an edict, "Ad Universos Provinciales:" "A proconsulibus, et comitibus, et his qui vice præfectorum cognoscunt, sive ex appellatione, sive ex delegatione, sive ex ordine judicaverint, provocari permitemus, &c. A præfectis autem prætorio, provocare non sinimus" (*Cod. Just.* lib. vii. tit. 62, s. 19). And again, "De provinciis ex quibus appellatur ad præfectum urbi." "Cum appellatio interposita fuerit per Europam, &c., præfecturæ hujus urbis judicium sacrum appellator observet" (*Ibid.* s. 23). The judicial and equitable functions of the governor of a province were recognised: "Si residuum debiti paratus es solvere, præses provinciæ dabit tibi arbitrum, apud quem quantum sit, quod superest ex debito, examinabitur," &c. (*Cod. Just.* lib. viii. tit. 27, s. 5).

<sup>2</sup> The "defensor," a functionary whose office was peculiar to the Roman system, and, if its duties were in any degree carried out, it must have been of infinite service. In the *Cod. Just.* lib. i. tit. lv., there is a distinct head, "De Defensoribus Civitatum," and under this head an edict, s. 4, "De Officio Defensorum," applying to all the provinces. "In defensoribus universarum provinciarum erit administrationis hæc forma; scilicet, ut in primis parentis vicem plebi exhibeas; descriptionibus rusticos urbanosque non patiaris adflige; officialium insolentiæ, et judicum procacitate occurras, ingrediendi, cum voles, ad judicem liberam habeas facultatem," &c. (*Ibid.*) And there is a special edict in favour of the husbandmen, s. 3, "De Rusticis:" "Utili ratione perspectum est, ut innocens et quieta rusticitas, peculiaris patrocinii, id est defensoris locorum beneficio, perfruatur." Another edict is remarkable: it runs thus—"Si qui eorum qui provinciarum rectoribus obsequuntur, quique in diversis agunt officiis principatus, et qui sub quocunque prætextu publici muneris possunt esse terribiles, rusticano cupiam necessitatem obsequii quasi mancipio sui juris imponant, aut servum ejus vel forte bovem in usus proprios necessitatesque converterint; ablatis omnibus facultatibus perpetuò subjugentur exilio" (*Cod. Just.* lib. xi. tit. 53, s. 2). This shows that the coloni were capable of property, though, as they themselves were attached to the estates of their lords, so was their property, and hence it could not legally be employed for the advantage of others, off the estates. The



the provincial subjects from oppressive abuse, and it was his peculiar duty and function to interpose for their protection; and repeated edicts were issued to enforce the observance of this duty, especially in regard to the weaker and humbler classes of the community.

Nor was this all. For the Roman system, as established under the emperors,<sup>1</sup> made provision for obtaining, by means of provincial councils or assemblies, the general sense of the community, and thus ascertaining their wants and wishes, as a means of assisting the judgment, either of the provincial ruler or of the emperor, as to the measures to be adopted for their welfare.

And although it is true that, under the Roman rule, the provincial subjects of the empire were embraced in a comprehensive and elaborate system of taxation, it was administered by regular officers, carefully regulated and controlled by law. And as the revenue was mainly levied by contributions in kind,<sup>2</sup> analogous to those derived by private owners of estates from the coloni or cultivators, the combined effect of both systems was rather, by enforcing in-

language of the edict, it will be observed, is extremely expressive as to the possibility of oppression on the part of the officers of the provincial governors, and shows a sincere desire to prevent it.

<sup>1</sup> Thus there was an edict of Theodosius: "Si quid extraordinarium consilium postulatur, cum vel ad nos est mittenda legatis, vel nostræ sedi aliquid intimandum; id quod inter omnes communi consilio tractatuque convenerit, minime in examen cognitoris ordinarii referatur, provincialium enim desideria, quibus necessaria sæpe fortuitis casibus remedia deprecantur, vobis a cognoscere atque explorare permittimus; ut sint examinis tui, quæ ex his, auxilio tuo protinus implenda sint, et quæ clementiæ nostræ auribus intimanda videantur. In loco autem publico, de commune utilitate provincialium sententia proferatur; atque id quod majoris partis probaverit ad sensus, solennis firmet auctoritas." This was in the year 395, some time before the abandonment of Britain by the Romans, and it contains the whole principle of popular councils, not as mere turbulent assemblies, but for the intelligent purpose of ascertaining the wishes and views of the people. Montesquieu therefore did injustice to the Roman rule in the provinces when he described it as a Turkish despotism, "La liberté étoit dans le centre, et la tyrannie aux extrémités" (*De l'Esprit des Loix*, liv. xi. c. 19). He forgot that the provincial subjects, in a large proportion, had the rights of Roman citizens.

<sup>2</sup> The tenth book of the Code is most copious upon these subjects. The revenue was collected by the "procurator." It was in a great degree from impositions of a certain proportion of the produce of the earth—corn, hay, &c.—which was paid in kind or in money, according to arrangement. In some provinces a tenth was exacted (frumentum decimarum); in others—those which were conquered—an arbitrary quantity (frumentum stipendiarum). Besides this, the natives supplied the corn wanted for the army at a fixed price (frumentum emptum), and a certain quantity for the use of the governor, for which a compensation was usually paid in money (frumentum aestimatum). This was on a principle similar to that on which the coloni were bound to supply their lords a certain proportion of the produce of their farms. Allusions to those services or impositions are frequent in the Code.

dustry, and encouraging energy, to promote the cultivation of the soil, and to develop the resources of the country.

An elaborate organisation for the purpose of collection of a revenue by regular officers of the state<sup>1</sup> under the control of law, that revenue in the main derived from the cultivation of the soil, aided by a social rural organisation directed to the same object, as it had such an obvious effect in developing the resources of the country, would be likely to be perpetuated under any subsequent rule. And so, it will be found, it was under the Saxons.

So much for the civil laws and institutions of the Romans. It remains to notice their *ecclesiastical* laws and institutions, which, after the conversion of the empire to Christianity, and the establishment of the Christian church, became adapted to the relation of union between the church and the state.

The ecclesiastical divisions and organisation of the Romans, after this period, appear to have been based upon the civil; and thus, as there were civil "dioceses" or provinces, there were ecclesiastical; and as there were "manors," so there were parishes, which appear originally to have been derived out of, or founded upon them, by endowments of lands, and glebes, and tithes,<sup>2</sup> emanating from the lords of manors.

<sup>1</sup> Thus, an edict of Theodosius relating to the order in which dignities should be conferred, has this under the second head, "Secundo veniant vacantes, qui presentes in comitatu illustris dignitatis cingulum meruerunt. Sed administratores quidem etiam, comites rei private vacantibus, omnibus honorarii, anteponi censemus. . . . ut præfectorius questorio præponatur; non vacans comes thesaurorum, vel comes rei private, honorario questorio, vel magistri officiorum præferatur (*Cod. Just.* lib. xii. tit. 8, s. 2). The "comes thesaurorum" is by the commentator explained as "præpositus regulium thesaurorum" (which answers well to the original functions of the sheriff, who was, and is still, the collector of the royal dues) or "Præfectus ærarii." Now, in the most ancient of our chronicles, it is mentioned that there were "consuls," or "counts," and vice-consuls, or viscounts, and the Latin title of the sheriff is vicecomes.

<sup>2</sup> By a Roman council A.D. 380, it was decreed, "Ut decennæ atque primitias a fidelibus darentur" (*Baron. Annal.* tom. iv. an. 382, p. 375). There can be no doubt that tithes, or endowments out of the produce, as well as glebes, or endowments out of the land itself, were of Roman origin, as also all church dues or oblations. The Romans, when pagans, often devoted a tenth of the produce to the support of temples. Thus, for instance, in Cicero, "Decimam Hercule devovere" (*Cic. Nat. Deor.* 3, 36). "Neque Herculi quisquam decimam vovit, unquam si sæpius factus fuisset." The dedication was recognised by the Roman law, as in the law received from Ulpian by Justinian: "Si decimam quis honorum vovit, decima non prius esse in bonis definit quam fuerit separata, et si forti qui decimam vovit, decesserit ante se positionem, hæres ipsius, hæreditario nomini decimæ obstrictus est, voti enim obligationem ad hæredem transire constat (*Tit. de poll. cit.* b. ii. c. 2). The idea of a compulsory obligation to pay tithes arose at a later period, and was founded upon the dedication. But the dedication was originally customary.

Upon this subject, however, of ecclesiastical law, it is very necessary, before coming to the consideration of the history of English law, to consider what had been the imperial law of the Christian empire of Rome, as to the province of the church and the power of the bishops, and the privileges of the clergy, not merely in matters spiritual or ecclesiastical, but even in matters temporal.<sup>1</sup> Because, as the Roman law in general was the foundation of the laws of Christian Europe, so, especially upon this matter of the power of the church and the privileges of the clergy, it naturally formed the model for the laws of the various monarchies which arose out of the ruins of the empire, and, in particular, for those of our own, and it would be, it is evident, impossible to form a fair judgment upon the controversies which arose, on the settlement of our laws and constitutions, upon this subject, without having some regard to the laws which formed the source and origin of the pretensions out of which these controversies arose.

An enlightened and philosophical historian,<sup>2</sup> who has been cited more than once, has described the extent and the causes of the influence acquired by the church on the decline of the empire: "From the commencement of the fifth century, the Christian clergy had a powerful means of influence. The bishops and clergy had become the first municipal magistrates. Of the Roman empire there remained, strictly speaking, nothing but its municipal government. By the ruin of the cities, and the oppression of despotism, the curiales, or municipal bodies, had fallen into apathy and disarrangement. The bishops, on the contrary, and the body of the clergy, full of life and zeal, naturally came forward to superintend and to direct all. It would be injustice to reproach them with it, to accuse them of usurpation; it was the natural course of things. The clergy alone had moral strength and energy; they became powerful everywhere. Such is the law of the world."

"This resolution is manifest in all the legislation of the emperors of that age. Open the Theodosian or Justinian Code, and you find an immense number of laws referring municipal affairs to the bishops and the clergy."<sup>3</sup>

<sup>1</sup> *Vide Cod. Theod.*, lib. xvi. tit. 11; *Cod. Justin.* lib. i. tit. 4; *Bingham, Origines sive Antiq. Eccles.*, tom. i. lib. ii. cap. 7.

<sup>2</sup> Guizot's *Hist. Gen. de la Civiliz. en Europe*, 2me Lecon. p. 55-58.

<sup>3</sup> For this M. Guizot cites *Cod. Just.*, lib. i. tit. 4, "De episcopali audientia, et diversis capitulis quæ ad jus curamque pertinent Pontificalem," which amply bears

The Christian emperors commenced with the *protection* of the Christian church, and then lent to its laws all the sanction of the state.<sup>1</sup> The canons of the councils were made part of the laws of the empire, and the powers of the state were exerted to enforce them, so that in the course of time there was no portion of ecclesiastical discipline which was not confirmed by imperial decrees. As, for example, the observation of Sundays,<sup>2</sup> and other festivals of the church, the canonical penalties decreed by the church against the transgression of her laws, among her members;<sup>3</sup> the canons relating to the election of bishops, to residence, or to simony.<sup>4</sup>

The fundamental principle laid down by the imperial law of Christian Rome was, that to the church belonged the direction of spiritual matters, to the state the regulation of matters temporal; so that, as the state recognised the church, it was the duty of the state to protect, to sanction, or to enforce the laws of the church; a principle, it will be observed, based entirely upon the *voluntary* adoption by the state of the laws of the church, in consequence of the

out his testimony. One section is "De his qui ex consensu litigant apud episcopum" s. 7 (Honorius, A.D. 398). So, s. 8, "Episcopali iudicium ratum sit omnibus, qui se audiri a sacerdotibus elegerint, camque illorum iudicationi adhibendam esse reverentiam jubemas, quam vestris deferri necesse est potestatibus, quibus non licet provocare. Per iudicium quoque officia, ne sit cassa episcopalis cognitio, definitioni executioni tribuatur" (*Arcad. and Hon.*, A.D. 408). So s. 13, "De clericis lite pulsantibus;" so s. 19, "De defensoribus civitatum;" "ita enim eos præcipimus ordinari, ut reverendissimorum episcoporum nec non clericorum ac possessorum, et curialium, decreto constituentur" (A.D. 505). So *Just.*, lib. i. tit. 4, "de episcopali audientia;" lib. i. tit. 55, "De defensoribus." And so, in numerous other titles.

<sup>1</sup> The canons of the four general councils which had sat before the time of Justinian, and which had been successively confirmed by the emperors under whom they were convened, were placed by him among the laws of the empire: "Sancimus igitur vicem legum obtinere sanctas ecclesiasticas regulas, quæ à sanctis quatuor conciliis expositæ sunt aut formatæ. Prædictarum enim quatuor synodorum dogmata sicut sanctas Scripturas accipimus, et regulas sicut leges observamus" (*Just. Novella*, 131, c. 1; *et vide Cod. Just.*, lib. i. tit. 1, s. 7). This was after the Roman occupation of this country ceased, but before the foundation of the Christian Saxon kingdom, and, upon its foundation, the princes and prelates naturally took these Roman laws as their guides, as is manifest from the preambles of their written laws.

<sup>2</sup> Thus, as to the observation of Sunday, there was this edict, "Omnes iudices, urbanæque plebes, et cuncturum artium officia, venerabili die Solis (*i.e.*, Dominico die) quiescant. Ruri tamen positi, agrorum culturæ liberè inserviant, quoniam frequenter evenit ut non aptus alio die frumenta sulcis, aut vinæ scrobibus mandentur, ne occasione momenti pereat commoditas cælesti provisione concessa" (*Cod. Just.*, lib. iii., tit. 12, s. 3).

<sup>3</sup> (*Cod. Theod.*, lib. xvi., tit. 2; *Just. Nov.*, c. i. s. 10.)

<sup>4</sup> (*Cod. Just.*, lib. i., tit. 3, n. 31). All this may have been wrong in principle, but that is a question which does not belong to a work on legal history, which deals with the facts, as to the origin, the causes, and the development of laws.

state's acknowledgment of her divine authority, and, therefore, not at all involving any impeachment or disparagement of the independence of the state.<sup>1</sup>

The policy of these laws is a question which belongs rather to the philosophy than the history of laws. The points important to be observed in a work on legal history are, that these laws were laws of the state; that they were based upon the will of the state, founded, rightly or wrongly, upon certain views of the state, as to their tendency to promote the welfare of the empire; that they belong, therefore, to the domain of secular law; and that, as they formed the basis of the policy of the empire as to the church, they naturally and unavoidably influenced the laws and legislation of the Christian states derived out of the ruins of the empire, and, in particular, of our own.<sup>2</sup>

Upon this fundamental principle, all the former privileges or immunities conferred by the state upon the church or the clergy were granted as voluntary concessions by the state; the very granting of which implied and involved that they emanated from the state, so that no extent to which they were carried could affect its independence. Thus it was with the immunities of the clergy from taxation or services;<sup>3</sup> and thus it was with the still more important question of their exemption from secular jurisdiction,

<sup>1</sup> "Maxima quidem in hominibus sunt dona Dei á supernâ collata clementiâ sacerdotium, et imperium, et illud quidem divinis ministrans, hoc autem humanis præsidens ac diligentiam exhibens. Ex uno eodemque principio utraqüe procedentia humanam exornant vitam. Bene autem omnia geruntur, et competenter, si rei principium fiat decens et amabile Deo. Hoc autem futurum esse credimus, si sacrarum regularum observatio custodiatur, quam justî et laudandi et adorandi inspectores et ministri Dei verbi tradiderunt apostoli, et sancti patres custodierunt et explanaverunt" (*Just. Nov. vi.*, Pref). This was putting it on the ground of the will of the state, with a view to its own benefit, and the good of the empire. And so it was always put.

<sup>2</sup> It will be observed all through the voluminous imperial edicts on the subject, that this legislation is based upon the imperial mind and will as to what would be the proper policy to pursue, and as to the advantages to be derived from the establishment of the church; and all the rest is deduced from that establishment. It is not put upon any inherent or precedent right of the church to control the civil power; and so as to the laws founded afterwards upon this view.

<sup>3</sup> The principle of such exemption, at all events, from all services or burdens detrimental to the independence, or derogatory to the dignity, of ecclesiastics, is abundantly established in the imperial edicts (*Cod. Theod.*, lib. xvi., cit. 2). The emperor Honorius restored or confirmed the real immunities of the clergy from mean taxes and duties, or extraordinary burdens (*Cod. Theod.* lib. xvi., tit. 2), "nihil extraordinarium ab hæc (jugatione) superi inducti tum ve flagitetur, nulla positum instauratio, nullo translationum sollicitudo gignantur" (*Ibid.*) The principle was followed by our law in exempting the benefices of the church from feudal burdens.

which afterwards, in the middle ages, occasioned such controversies, in our own and in other countries.

Upon that principle, above all, was this privilege of the clergy based ; and upon that principle, indeed, it was carried much further by the imperial edicts—even to the extent of allowing laymen to decline the jurisdiction of the lay tribunals, and refer their disputes to the bishops.<sup>1</sup> And the governors of provinces were directed to enforce the episcopal decrees.

This, be it observed, was clearly only a delegation of the power of the state to the bishops ; it was open to the state to select, or allow the people to select, ecclesiastical judges as well as secular ; it was a matter entirely of state policy, of state regulation, and therefore, to whatever extent it was carried, it could not possibly involve any disparagement of the independence of the state.<sup>2</sup>

In an age when the policy of the state actually allowed its own tribunals to be displaced, and the episcopal authority substituted even as between laymen, and as regarded temporal matters, it is not surprising that it should have allowed the episcopal authority an extensive jurisdiction over the ecclesiastics, either in civil or

<sup>1</sup> This the ecclesiastical historians tell us was done by Constantine ; whose father died at York, and in whose time there was the closest connexion between Rome and Britain. “Fuit hoc etiam argumentum vel maximum reverentie quam pius princeps erga religionem gerebat. Nam et omnes ubique clericos immunitate donavit, lege hac de re specialiter datâ ; et litigantibus permisit ut ad episcoporum judicium provocarent, si magistratus civiles rejicere vellent eorum autem sententia rata esset, aliorumque judicium sententiis prævaleret perinde ac si ab imperatore ipso data fuisset ; utque res ab episcopis judicatas, rectores provinciarum eorumque officiales executione mandarent” (*Sozomen Eccl. Hist.*, lib. i. c. ix. ; *Annales du Moyen Age*, v. i. c. ii. ; *et vide Theod. Cod. Extrav.* i. p. 260).

<sup>2</sup> The imperial policy in fact varied upon it ; thus we find a decree of Honorius rather restrictive of the episcopal jurisdiction to spiritual causes. “Quoties de religione agitur, episcopos convenit judicare ; cæteras vero causas quæ ad ordinarios cognitores (seu judices), vel ad usum publici juris (*i.e.*, juris communis) pertinent, legibus oportet audiri” (*Cod. Theod.*, lib. xvi. tit. xi. c. i.) On the other hand, in the Justinian code, we find two constitutions of the same emperor giving to the bishops generally, the power of judging definitely even in temporal matters, like the prætorium prefect, but with two qualifications : that the jurisdiction could only be exercised by consent of the parties, and only in civil, not criminal matters. “Si quis ex consensu apud sacræ legis antistitem litigare voluerint, non vetabuntur ; sed experientur illius in civili duntaxat negotio ; more arbitri sponte residentes judicium” (*Cod. Just.* lib. i. tit. iv. s. 7). “Episcopale judicium ratum sit omnibus, qui se audiri à sacerdotibus elegerint, eamque illorum judicationi adhibendam esse reverentiam jubemus, quam vestris deferri necesse est potestatibus (*i.e.*, potestatibus præfecti prætorio) a quibus non licet provocare” (*Ibid.* s. 8). These fluctuations and variations of imperial legislation on the subject clearly show that it was a matter entirely of state policy, and could not compromise state independence.

criminal matters, and whether as regarded their persons or their property.<sup>1</sup>

The imperial law upon this principle laid it down that in civil matters clerics must be brought before the episcopal jurisdiction in the first instance, and in criminal matters, before the episcopal or the lay tribunal; but that the guardians of churches could not be cited except before the bishops, and that the bishops could not be prosecuted before the secular judge, for any cause: on which it will be observed that the very laws by which the state endeavoured to secure the independence of the church attested its own independence, and showed that it was not a claim of inherent right in the church, but of voluntary concession by the state. Nor can it be surprising that the law of the church should have supported in this matter the law of the state, and that canonists should have followed jurists and legists.<sup>2</sup>

Indeed, the laws of the empire upon this subject went to the full extent of the most extreme pretensions of canonists in later times; and it is impossible to study them at this day without surprise. The judicial powers of the bishops either over ecclesiastics or laics, were by no means the greatest of their powers. The imperial laws conferred upon them the most important powers, and confided to them the most important functions of secular administration, or the affairs of government.<sup>3</sup>

<sup>1</sup> Thus we find a law of the emperor Honorius: "Clericos non nisi apud episcopos accusare convenit. Igitur si episcopus vel presbyter apud episcopum (siquidem alibi non oportet) a qua libet persona fuerint accusati, noverit docenda probationibus, monstanda documentis crimina se debere inferre" (*Cod. Theod.*, lib. xvi. tit. ii. c. 61). It is true that another emperor rather varied this; but then Justinian, it will be seen, restored it; and again it may be observed that these variations and fluctuations of imperial policy only prove its entire independence of ecclesiastical power.

<sup>2</sup> *Cod. Just.* lib. i. tit. 4. Episcopali audientia (*Just. Nov.* 131, c. 1).

<sup>3</sup> Thus an imperial edict (A.D. 368) charged the bishops to watch over merchants, in order to prevent or correct injustice, especially to the poor. "Negotiatores, si qui ad domum nostram pertinent, neamodum mercandi videantur excedere, Christiani (quibus verus cultus est, adjuvare pauperes, et positos in necessitate), provideant episcopi" (*Cod. Just.* lib. i. tit. iv. s. i.) So a law of the emperor Honorius and Theodorus the younger (A.D. 409) ordered that the defenders of cities should be chosen by the bishops at a meeting of the clergy and chief citizens. It has already been mentioned that, as a part of the policy of the Christian empire, there was in every city a public functionary charged with the protection of citizens against all oppressions, either of magistrates or private citizens (*Cod. Theod.* lib. i. tit. xi.; *Cod. Just.* lib. i. tit. iv.) Another edict of the emperor was this: "Defensores ita præcipimus ordinari, ut sacris orthodoxæ religionis inbuti mysteriis, revendissimorum episcoporum nec non clericorum, et honoratorum, ac possessorum, et curialium decreto constituantur; de quorum ordinatione referendum est ad illustrissimam præ-

The imperial laws charged the bishops in the provinces of the empire with the protection of orphans, slaves, prisoners, and generally of all wretched or defenceless persons, whose age or condition rendered them more liable to oppression. By virtue of these laws, the bishops were bound, in conjunction with the civil magistrate, to interfere in the nomination of tutors and trustees, to watch over the liberty of children abandoned by their parents, to visit prisoners and ascertain the causes of their detention, and watch over the police; to admonish the civil magistrates of any disorders, and to report to the emperor any neglect of the magistrate to repress such disorders.<sup>1</sup>

These laws themselves no doubt abundantly indicate the independence and supremacy of the state in secular matters, and show that all these concessions of power to the ecclesiastical authorities were emanations of state policy; but for that very reason it is not surprising that they should have been made, in after ages, in all countries which had been parts of the Roman empire, and where these laws had been enforced, and among others, in our own, the basis of a system of policy similar in character.<sup>2</sup>

Such was the system of rule—civil and ecclesiastical—established

torianam potestatem; ut literis ejusdem magnificæ sedis eorum solidetur auctoritas” (*Cod. Just.* lib. i. tit. iv. s. 8. tit. iv. s. 19). Other edicts allowed young people, free or slave, to have recourse to the protection of the bishop against their parents or owners, when these were vicious; as the court of Chancery in this country is resorted to to remove improper guardians. “Si lenones patres, et domini suis filiabus vel ancillis peccandi necessitatem imposurint, liceat filiabus et ancillis, episcoporum imploratio suffragio, omni miseriarum necessitate absolvi” (*Cod. Just.*, lib. i. tit. iv. s. 12. c. 14). So, under many similar titles.

<sup>1</sup> Most of these imperial constitutions are collected in the first book, *Justinian Code*, tit. 4, s. 22–24, 30, 33. One instance may suffice as a specimen. “Neminem volumus in custodiam conjici, absque jussu magistratuum provinciarum, aut defensorum civitatum. De his autem quicunque conjecti aut conjiciendi sunt, Deo amabiles locorum episcopos jubemus per unam cujusque hebdomadæ diem, eos qui in custodiâ habentur visitare, et diligenter inquirere causam ob quam detinentur, et sive servi sint, sive liberi, sive pro pecuniis, sive pro aliis criminationibus, sive pro homicidiis conjecti, magistratus admonere, quam eos qui sunt in provinciis, ut ea exequantur circa ipsos, quæ divalis nostra constitutio, ad illustres prefectos, ea de re emissa præcipit, licentiâ datâ Deo pro tempore episcopis, si quam negligentiam admissam cognoverint, ab magistratibus vel iis quæ illis parent officiis, talem ipsorum negligentiam indicandi, ut conveniens adversus negligentes animi nostri motus insurgat” (*Ibid.* s. 22).

<sup>2</sup> Imperial laws were sometimes even addressed to prelates. Thus, for instance, the eighth novella of Justinian, which regards elections and duties of magistrates, was addressed to metropolitans: “Traditæ nobis à Deo reipublicæ curam habentes, et in omni justitia vivere nostros subjectos studentes, subjectam legem scripsimus; quam tuæ sanctitati, et per eam omnibus qui tuæ provinciæ sunt, facere manifestam bene habere putavimus. Tuæ igitur sit reverentiæ et cæterorum (episcoporum)



in this country for some centuries. It seems a probable and reasonable opinion that under such circumstances the laws and constitutions of the Romans should, as the Britons grew more and more civilised, be adopted by them, and become in a great degree blended with their customs and institutions, even if the two races were not in a great degree blended, as they undoubtedly were to a very considerable extent.<sup>1</sup>

It will have been seen how calculated such a wise, complete, and salutary system of rule must have been, on the one hand, to implant itself firmly in a country, and, on the other hand, to attract the respect and confidence of the inhabitants, and blend its laws and institutions with their customs. And it is to be borne in mind that not only would the Britons naturally adopt the laws and institutions of the Romans, but a large portion of the population, in that, as in all the other European provinces of the empire, was, from various causes, and especially from the constant influx either of military or civilian colonists,<sup>2</sup> actually Roman, or composed of Roman citizens.

The influence of Roman laws and institutions upon the barbarian nations they subdued has not escaped the attention of historians. Several passages in the earlier chapters of Gibbon abundantly

*hæc custodire, et si quid transcendatur à iudicibus, ad nos referre" (Just. Edict. Archiepiscopis, Nov. viii.)*

<sup>1</sup> Thus Sir M. Hale, writing upon this subject in his *History of the Common Law*, c. 5, though clinging, as all our common law writers do, to the notion of British laws, says, that "though a change of the laws of a conquered country was rarely universally made, especially by the Romans, yet that they in their own particular colonies, planted in conquered countries, observed the Roman law, which might by degrees, without any rigorous imposition, gain and insinuate themselves into the conquered people, and so gradually obtain and insensibly conform them—at least so many of them as were contemporaneous to the colonies and garrisons—to the Roman law;" and that the Romans rarely made a rigorous and universal change of the laws of the conquered country, "unless they were such as were foreign or barbarous, or altogether inconsistent with the victor's government;" which those of the Britons on the arrival of the Romans undoubtedly were. As regards nations which have settled laws and civilised institutions, what Hale says is undoubtedly true, and it applies to the invasion of the Saxons upon the Romanised Britons—civilised and settled by four centuries of Roman occupation.

<sup>2</sup> Montesquieu, citing Tacit. Ann. lib. xiii. c. 27, "date fuscum in corpus," &c., notices this constant flow of citizens or enfranchised slaves, as colonists, into the provinces: "Le nombre du petit peuple, presque tout composé d'affranchis ou de fils d'affranchis, devenant incommode, on en fit des colonies, par le moyen des quelles on s'assura de la fidélité des provinces. C'était une circulation des hommes de tout l'univers. Rome les recevait esclaves, et les renvoyait Romains" (*Grand et Decad. des Rom.* c. 13). Montesquieu also alludes to the important influence of intermarriage, "Les lois favorisèrent les mariages, et mêmes les rendirent nécessaires" (*Ibid.*)

attest it.<sup>1</sup> And then other two causes would co-operate largely to extend the influence of the Roman law in its subject states, even when that law was not actually imposed. The one was the advantage derived from becoming a Roman citizen, which could only be by adopting the Roman laws, and the other was the policy of the Romans in settling colonies in conquered states. These results are thus clearly described by a late lamented writer, who admirably united the gifts of genius and of erudition, and whose untimely death has been so deeply deplored, not only by the profession but by the nation : "It was a principle of Roman law that no Roman citizen could be the citizen of any other community distinct from that of Rome, and governed by different institutions. The towns which the Romans admitted to a share of their rights were termed *municipia*. The adoption of the Roman laws was a necessary condition" (*Study of the Roman Laws*, p. 190).

Again,—“It was the profound policy of the Romans to confiscate a portion of the conquered territory and to occupy it with their own citizens, thereby at once increasing ultimately their own population, providing for the more indigent citizens, and riveting the chain around the vanquished. Originally the colonies were not on a level with the municipal towns; they were not admitted to a participation in the rights of Roman citizens. If one of the states

<sup>1</sup> “The same salutary maxims of government which had secured the peace and obedience of Italy were extended to the most distant conquests. A nation of Romans was gradually formed in the provinces, by the double expedient of introducing colonies, and of admitting the most faithful and deserving of the provincials to the freedom of Rome. That wheresoever the Roman conquers he inhabits, was a very just observation of Seneca, confirmed by history and experience. The natives of Italy hastened to enjoy the advantages of victory. These voluntary exiles were engaged in the occupations of agriculture, &c. But after the legions were rendered permanent, the provinces were peopled by a race of soldiers, and the veterans usually settled in the country where they spent their youth. Throughout the empire, but more particularly in the western parts, the most fertile districts and the most convenient situations were reserved for the establishment of colonies, some of which were of a civil and some of a military nature. In their manners and internal policy the colonies formed a perfect representation of their great parent; and they were soon endeared to the natives by the ties of friendship and alliance, and a desire of sharing in due time its honours and advantages. The municipal cities insensibly equalled the rank and splendour of the colonies. The right of *Latium*, as it was called, conferred on the cities to which it had been granted a more partial favour. The magistrates, at the expiration of their offices, assumed the quality of Roman citizens, and as these offices were annual, they in a few years circulated round the principal families. Thus the bulk of the people acquired, with the title of citizens, the benefit of the Roman laws, especially as to marriage testaments and inheritances” (*Dec. and Fall.* c. 2). It would be impossible to give a more lucid account.

became a *municipium* of Rome, it at first retained its internal administration, but latterly magistrates were sent from Rome for the purpose of administering justice, *præfecti juri dicendo*. The *Lex Julia* gave the rights of Roman citizens. There were magistrates who held an office analogous to that of the Roman prætor or consuls, and who were chosen by the people, and whose chief duty was the administration of justice" (*Study of the Roman Law*, p. 15).

The Roman system of government in the provinces<sup>1</sup> was one so complete and perfect in all its parts, with such an elaborate organisation, not only extending over every part of the country, but en-

<sup>1</sup> The learned Lingard gives a short but clear sketch of it: "The governor was denominated the præfect, or proprætor. He united in his own person every species of authority which was exercised by the different magistrates in Rome. He commanded the army; he was invested with the administration of justice. The power of the præfects, however, was confined by the Emperor Hadrian, who, in his 'perpetual edict,' laid down a system of rules for the regulation of their conduct, and established a uniform administration of justice throughout all the provinces. Subordinate to the præfect was the procurator, whose duty it was to collect the revenue of the provinces. When the Roman conquests in Britain had reached their utmost extent, they were divided into six provinces, under prætors appointed by the præfect. Throughout the provinces were scattered a great number of towns and military posts, the names of which are preserved in the 'Itineraries' of Richard of Cirencester, and of Antoninus. (There were in all not less than one hundred and sixty-six stations, besides smaller forts.) They were partly of British and partly of Roman origin, and were divided into four classes, gradually descending in the scale of privilege and importance. The colonies, of which there were nine, included among them London, Colchester, Bath, Gloucester, Chester, and Lincoln. It was the policy of Rome to reward her veterans with a portion of the lands of the conquered nations. Each colony was a miniature representation of the parent city. It adopted the same customs, was governed by the same laws, and, with similar titles, conferred on its magistrates a similar authority. In Britain there were nine of them, two civil and two military. In the constitution of the latter we discover a striking similitude to the feudal tenures of later ages. Secondly, there were the municipal cities, the inhabitants of which were exempted from the operation of the imperial statutes, and, with the title of Roman citizens, possessed the right of choosing their own *decuriones*, or magistrates, and of enacting their own laws. Privileges so valuable were reserved for few, and Britain could boast of only two *municipia*, Verulam (St Albans) and York. But the *jus Latii*, or Latian right, was bestowed more liberally. Ten of the British towns had obtained it from the favour of different emperors, and were indulged with the choice of their own magistrates, who, at the expiration of the year, resigned their offices, and claimed the freedom of Rome. That freedom was the great object of provincial ambition, and, by the expedient of annual elections, it was successively conferred on almost all the members of each Latin corporation. The remaining towns were stipendiary, compelled to pay tribute, and governed by Roman officers appointed by the prætor. These distinctions, however, were gradually abolished. Antoninus granted to every provincial the freedom of the city; Caracalla extended the indulgence to the whole body of the natives" (*Hist. Eng.*, vol. i. ch. 1); so that the edicts prohibiting natives from holding offices of trust, or holders of such offices from marrying natives, would not apply (*Cod. Theod.* viii., *Pand.* xxii., tit. ii., tit. xv. leg. 1).

tering into all the relations of life and all classes of society, that it could hardly fail to implant its laws and institutions very deeply even among the native population; and when to this is added the establishment of colonies, the erection of municipal corporations, the operation of the manorial system, and the effect of intermarriages in blending the Roman and the British races, it is impossible not to see that Roman laws, institutions, and ideas must have taken firm root, especially as there was a uniform administration of justice.

Those who had been so long accustomed to the Roman rule would probably, even while asserting their independence of it, desire to preserve the laws and institutions, the advantage of which they had so long enjoyed;<sup>1</sup> and the voice of history assures us that this was so in point of fact.

From these causes, it was impossible but that, in the course of the centuries during which the whole fabric of Roman society and of Roman civilisation,<sup>2</sup> with all its laws and institutions, was firmly

<sup>1</sup> Thus the learned Lingard, citing Zosimus, tells us that when the Emperor Honorius wrote to the British authorities to provide for their own safety, and the Roman magistrates were deposed, "the British states themselves re-established civil government on a similar foundation." And the historian adds: "As the colonies, 'municipia,' and Latin towns had always formed so many separate commonwealths, under the superintendence of the provincial presidents, they would probably wish to retain the forms of government to which they had so long been accustomed" (*Hist. of Eng.*, vol. i. c. 1). The learned historian, indeed, seems to have supposed that a state of anarchy ensued, in which all laws and institutions perished; but this is opposed to the views of Savigny and of Guizot, and is not sufficiently supported by authority. And even if it were, the tradition of such laws and institutions would remain long after the institutions were destroyed.

<sup>2</sup> One of the most learned and acute writers on our earlier history, Sir Francis Palgrave, has ably enforced this view. "The Romans," he says, "fortified many strong cities in different parts of the island, and these colonies, or 'municipia,' were peopled with Roman inhabitants, who came hither from Italy accompanied by their wives and children. The Britons, or at least those tribes who inhabited the vicinity of the Roman colonies, soon adopted and emulated the customs of their masters. They learned to speak the Latin language, adopted Latin names and Roman manners. British princes were allowed to retain their dominions beneath the Roman supremacy. In other districts the land was allotted out to the Roman colonists, under whose power the British cultivators of the soil passed into a state of prædial slavery or villenage. The colonial policy of Rome sustained some alterations in form between the age of Agricola and the fifth century, but the main principles remained unchanged. Taking the reign of Constantine as the middle point of development, the whole Roman empire was divided into four great 'prefectures' or governments, Britain being included in the jurisdiction of the prefect of Gaul. The prefectures were divided into dioceses, and Britain was a diocese. The dioceses were divided into 'provinces,' subjected to presidents or consulars, and vicars or vice-consulars, each order in their degree invested with the various powers of judicial government

established here, those laws and institutions must have taken deep root, the institutions through their being everywhere planted, and the laws through their becoming incorporated with the customs of the people.

It is the opinion of those whose researches into our early history give their opinions highest authority, that, after the decline of the Roman empire and the withdrawal of the Roman legionaries,<sup>1</sup> the

and civil policy. The military command of the provinces was intrusted to the 'comites,' each having his own district or territory" (in which we see the origin of the *comitatus*, or county). "From the reign of Constantine these functionaries held a conspicuous rank in the state, and were gradually invested with civil as well as military rank. The cities enjoyed considerable privileges, and possessed a distinct political existence. The ruling body, termed the *curia*, was composed of senators or *decuriones*; and, moreover, besides the municipal corporations, each city had its 'colleges,' or guilds, of tradesmen and artificers. The prefects and other governors were practically in their own departments despotic; yet a species of controlling power existed in the provincial councils or assemblies, the constitution of which cannot be precisely defined, though deputies from the cities and great landed proprietors, and probably the bishops, had seats" (*Rise and Progress of the English Commonwealth*, c. x. and xi.) "The councils assembled in course, and at stated times of the year, unless any emergency arose, in which case they were summoned by the rescript of the emperor. If local regulations only were required, the councils were authorised to enact ordinances; but in matters of importance, and especially if the provincials needed the redress of any grievances, they could only address their petitions to the emperor. In many parts of the empire, such as Narbonensian Gaul, these councils appear to have been engrafted upon the institutions existing among the conquered nations. Was this the case in Britain? The question is interesting, but difficult. It is sufficient to observe, however, that these local legislatures, however qualified their powers might be, continued to keep alive a feeling of national or independent existence, and prevented the provinces from being merged in the vast orb of the empire. And, transmitted through the middle ages, they became one of the elements at least out of which the parliaments, states-general, and other legislative assemblies of modern Europe were gradually formed" (*Ibid.*) The exact conformity of all this with the tenor of the imperial edicts, on the one hand, and the language of the Roman or Saxon historians, on the other, will be apparent; and there is also an entire accordance between the views of Palgrave on the subject and those of Savigny, Mackintosh, and Guizot. Elsewhere Sir F. Palgrave says: "These provincial assemblies participated in all the feelings and opinions of their countrymen, and virtually represented the wealth and respectability of the land" (*Hist. of the Anglo-Saxons*, ch. i.) What strong tendency all this must have had to deepen the hold of Roman laws and institutions on the country, and how contrary it is to the common notion that these assemblies were of Saxon origin, need not be pointed out. The Saxon assemblies were mere turbulent assemblies of the people, without representation.

<sup>1</sup> This was only a withdrawal, be it observed, of the legions who had remained embodied, or had newly arrived. There was no wholesale withdrawal of the Roman population, or of the settled Roman colonists; and indeed it is obvious that the British must have become Romanised, and the two races blended, in the course of centuries. Sir F. Palgrave says: "The Bretwaldas (or British or Saxon rulers) must be considered as the successors of the Roman emperors or rulers," and we may affirm that, so soon as the royal authority became developed among any of the barbarians

Romanised Britons (the two races having been so long together that they must, to a great extent, have become blended) retained, as might be expected, the Roman ideas of government, and the Roman laws and institutions, and that these were likewise, in a similar way, transmitted to subsequent races of barbarian invaders, who, before their conquests were complete, became blended with the Romanised inhabitants of the island.

Nothing is more remarkable in the history of this country than the gradual blending of the successive races and their laws and institutions, and one of the most remarkable, though perhaps least recognised illustrations of this, is afforded by the manner in which the Roman occupation<sup>1</sup> paved the way for the Saxon invasion, and, on the other hand, prepared the way for the adoption by the Saxons of the Roman institutions.

There would, therefore, it is manifest, be every reasonable pro- who settled on Roman ground, all their kings took upon themselves, as far as they could, to govern according to the spirit of the Roman policy, and agreeably to the maxims prevailing in the decline of the empire, and declared in the imperial law (*Ibid.*)

<sup>1</sup> It has already been mentioned that it was the habit of the Romans to form military colonies in conquered countries, settling their legions in the districts in which they were posted, by grants of land, on military tenure. Thus Sir F. Palgrave says: "The general system of defence was founded upon the principle of paying the soldier by giving him land. Thus the march or border countries were granted almost entirely to the Limitanean soldiery, upon conditions which have been well described as containing the germ of the feudal tenures. Such land could not be alienated to a non-military owner. The Limitanean soldiery, as their name imports, continued settled on the frontiers; but in the same manner, or nearly so, were all the other Roman legions rooted and fixed in the interior of Britain. They were permanently established in the island, and military service was an imperative condition." In process of time the same system was applied to barbarian troops in the service of the empire, and thus, as Sir F. Palgrave states, two German tribes became established in Britain, and of course Romanised. The result of this in promoting the invitation, or invasion of others and their adoption of the Roman institutions, will be apparent. And this system, on the one hand, greatly conduced to the rise of barbarian rule, and, on the other hand, tended to subject it to the influence of Roman institutions. For, as Sir F. Palgrave points out, the power of the local legionaries, combined with the influence of provincial assemblies, would combine to support provincial rulers who assumed an independent position. That there were such rulers in Britain after the decline of the Roman emperor, is a fact of which there is no doubt. These rulers aped Roman power, and called themselves emperors. And, as Sir F. Palgrave says, "Unconscious of the ends which they were destined to accomplish, the provincial emperors may be considered as the precursors of the barbarian dynasties. The political ancestry of the ancient monarchs of Anglo-Saxon Britain must therefore be sought amongst these sovereign Britons" (*Hist. of the Anglo-Saxons*, c. i.) "Princes reigned in Britain long after the extinction of the Roman power who traced their descent from Maximus" (*Ibid.*) "And when the connexion between Rome and Britain was entirely severed, Britain broke into various independent states; but there remained a Roman party, headed by men of Roman name" (*Ibid.*)

bability that the Roman laws and institutions would be adopted in this country, and would continue to exist here even after the Roman rule was at an end. Nor is it left to probability; it is converted to the positive certainty of historic truth by the actual existence of the laws of the Romanised Britons,<sup>1</sup> compiled at a period posterior to the termination of the Roman rule in the island, and anterior to the later Saxon laws.

The Roman Britons are found, according to these laws, to have had, in the first place, a clear, definite, and decided view of the superior powers and prerogatives of the sovereign ruler, as representing the state,<sup>2</sup> especially as to the ultimate ownership of land unappropriated, or on failure of legal owners, or the like.

In these laws, of which there was a Latin version, will be found clear traces of the Roman system of organisation,<sup>3</sup> of Roman division, and of Roman laws and institutions, which could never have been derived from the Saxons, seeing that they are vastly superior to the latest Saxon laws, and there is no mention in the Saxon laws of their establishment, and such of them as are

<sup>1</sup> The body of laws compiled by Howell Dhu in Wales in the tenth century—A.D. 940—about the time of the laws of Edgar. It has already been seen that the Britons, before the Romans came, were mere barbarians, and had no laws at all; so that any laws they had afterwards, especially as they corresponded closely with the Roman, can only be ascribed to a Roman source. It need hardly be stated that, at the close of the Saxon Conquest, the independent Britons had been forced mainly into Wales, and Lord Hale admits, in commenting on the "*Statutum Walliæ*" (*temp.* Edward I.), which recites a certain law or custom in Wales, differing from our own, that it is evidence of what was the British law. But then he forgot that this must have been a British law derived from the Romans.

<sup>2</sup> Thus all lands were deemed to be held of the sovereign as paramount lord, and reverted to him if the conditions on which they were held were not fulfilled, or on failure of the heirs of the possessor: "*Si clericus fundum sub rege tenuerit, ejus nomine servitium regi præbere obligatur, is in curia pro fundo isto et rebus ad eandem pertinentibus respondere tenebitur; terra enim totius regni ad regem pertinet. Et nisi promte responderit ad regem, fundus iste redebit*" (*Leg. Wall.*, lib. 4, c. cxxvi. s. 5). So the prerogative of the sovereign was held to confer on him, besides the ultimate property of all the lands within his territories, the ownership of the sea-coast, and of all unoccupied or waste places, as among the Romans the *vacua regia* pertained to the state (*Ibid.*, lib. i. c. 47). He was also entitled to the property of persons dying without issue (*Ibid.*)

<sup>3</sup> Thus it appears that the country was divided into counties, and into "cantreds" or "hundreds," and also into tithings or tens. So it appears that there were "tons"

"towns," which were farms or vills—no doubt the Roman manors. Beyond all doubt there were the Roman "coloni" or serfs, for they are mentioned by the name of "villani," and these belonged to manors. The counties and hundreds could not have been of Saxon origin, for the "shire" is mentioned in the earliest Saxon laws—those of Ina—as already existing; and, on the other hand, hundreds are not mentioned until the laws of Edgar—later than these British laws.

mentioned at all, are only in the earliest laws as already in existence.

The Roman system of the occupation of the land belonging to an estate, by tenants bound to the cultivation of the soil, or to servile labour upon the estate, appears clearly to have continued, and with it all the incidents of such a tenure at the will of the owner, or lord, without any permanent estate or any property in the lands occupied, as in which, however, customs or rights existed, or were afterwards acquired.<sup>1</sup>

These Romanised Britons had, like the Romans, evidently derived from them regular rules of inheritance, and as to the devolution of land by descent, dividing the lands as the Romans did,<sup>2</sup> among the children of the former owner. And, at the same time, they had cherished a clear and definite idea of property in land in the sense of dominion.<sup>3</sup>

These Romanised Britons, too, had a regular administration of justice, both local<sup>4</sup> and supreme,<sup>5</sup> in which latter the rules and forms of procedure, plainly borrowed from the Roman law, are laid down fully and correctly, embodying all the substantial features of the Roman civil procedure.

It would of course be idle to suppose that these laws and institutions could have emanated from the barbarian Britons, and equally idle to suppose that, though compiled in Saxon times, they

<sup>1</sup> "Villanorum filii in fundos paternos non succedent, communes enim erunt illis cum cæteris villanis. Filius tamen natus minimus cujuslibet eorum patre mortuo domicilium ejus jure hereditario habebit" (*Lex. Wall.*, lib. ii., c. 12, s. 11). "Nulla pars terræ quem villani incolunt, regi decedet. Nec ulli villani licet alterius partem emere, singulorum enim partes æquales erunt: nec regi ulla pars decedet eo quod æqualiter inter omnes villanos dividenda sit" (*Ibid.* lib. i., c. xliii., s. 2). The Roman "coloni" are clearly here meant, for they are mentioned under that name in the Latin version of the Laws of Ina, where also they might have been derived from the Romans.

<sup>2</sup> There was a fluctuation in the Roman law upon the subject. The Twelve Tables divided the land among the sons only; the later law among all the children. The general principle was a division of the property. The Roman Britons appear, by these laws of Wales, to have retained the laws of the Twelve Tables, and divided the land among all the sons. This is recited in the *Statutum Walliæ*, temp. Edward I., and Lord Hale says this is good evidence of what the law was among the Britons, *i.e.*, the Roman Britons (*Hist. of Com. Law*).

<sup>3</sup> Dominus. Is qui rei dominium et proprietatem habet (*Gloss. a Lex. Wall.*)

<sup>4</sup> Controversia etiam de fundis hereditariis inter aliquos inferiore cognationis gradu quam qui partitionem peculiarem petere possunt, in curia principali terminare debent; sed tales lites inter propinquos intra tertiam generationem, terminandæ sunt in curia cui fundus litigatus subjacet (*Triads*, cclviii. 4).

<sup>5</sup> There is a regular system of procedure described in the superior courts, with all the forms in real actions afterwards described in Glanville or Bracton.



could have been derived from the Saxons, who at that time had them not themselves.<sup>1</sup> And as by a kind of exhaustive process it has been shown that the laws and institutions existing here at the time of the decline of the Roman empire must have been derived from the Romans, because the British were mere barbarians before the Romans came, so a similar process leads to the same conclusion as to the Saxons, who had not, when they came over, the very rudiments of law, nor even the idea of sovereign power which lies at its basis, but were mere wandering predatory warriors.<sup>2</sup>

The habits and character of the Saxons,<sup>3</sup> when they invaded this country, were such as to preclude the possibility of their having

<sup>1</sup> Sir F. Palgrave shows that the Saxons had not even the idea of supreme sovereignty: having only numerous popular chiefs called eldersmen (*Hist. of Anglo-Saxons*, c. iv.) And, of course, such a people had not any notion of settled property, of regular judicature, or of regular law. They were mere wandering predatory tribes, each having its own chieftain. This is the account which Guizot gives of the German invaders generally, and it was eminently true of the Saxons (*Lect. sur la Civiliz. en l'Europe*). So our own Hume calls them "those generous barbarians," though it would be more correct to call them savage barbarians. Taking the most favourable view of them given by Tacitus, it is evident that they were barbarians.

<sup>2</sup> This can be seen by a comparison of their laws with the contemporary Saxon laws, which were utterly barbarous. Added to this, the Britons in Wales were those who had upheld their independence, and were in constant hostility with the Saxons.

<sup>3</sup> As they are described by Tacitus, they appear to have been very much in the same state as the Britons on the arrival of the Romans, a rude, wandering, warlike race, who had many barbarous usages, but nothing that could be called laws or civilised institutions. This indeed was impossible, as they did not cultivate the ground, and had no idea of that fixed property on land which lies at the basis of all civilisation and law. "Honoratissimum assensus genus est armis laudare. Eliguntur in iisdem conciliis et principes, qui jura per pagos vicosque reddunt. Centeni singulis ex plebe comites consilium simul et auctoritas adsunt." Those sentences, detached from the context, are often cited to show that they had the division into counties and hundreds; but the context shows that this was merely a numerical division for military purposes, not a civil institution. "Nihil autem neque publicæ neque privatæ rei, nisi armati agunt . . . Principes pro victoria pugnant, comites pro principe. . . . Nec arare terram, aut expectare annum, tam facile persuaseris, quam vocare hostes et vulnera mereri. . . . Nullas Germanorum populis urbes habitari, satis notum est, ne pati quidem inter se junctas sedes. -Colunt discreti ac diversi, ut fons, ut campus, ut nemus placuit. Vicos locant, non in nostrum morem, connexis et cohærentibus edificiis; suam quisque domum spatio circumdat, &c. Agri pro numero cultorum ab universis per vices occupantur. . . . Arva per annos mutant, et super est ager, nec enim cum ubertate et amplitudine sole labore contendunt, ut prata sepiant; sola terra seges imperatur" (*De Mor. Germ.*) It is obvious that the usages of these people were as unlike the institutions of the Romans or the Romanised Britons as possible; so that if afterwards we find them with those institutions, it could only be from the latter they were derived.

brought hither any of those civil laws or institutions which were afterwards found among them, and which therefore they must have derived from the Romanised inhabitants and institutions they found established here. All the original habits and usages of the Saxons were rude and truly barbarian, and such as suited unsettled, wandering, and uncivilised tribes, and not such as were fitted for civilised life.

Naturally, and indeed necessarily, these barbarians, when once settled in the country, and finding very admirable and convenient institutions already implanted in it,<sup>1</sup> would adopt them; and having adopted the institutions, would as naturally, although gradually, adopt a good deal of the laws which had become blended with them, and mixed up with the customs of the country, the more so, since, having no settled institutions of their own, there was nothing to oppose to them. And the history of our laws and institutions, from the time of the Saxon invasion, is a history of this gradual progress, and of a struggle between the principle of reason, represented by the Roman law, and the principle of custom, represented by the rude usages of the barbarians.

Tribes which live a wild, wandering, warlike life, as the Saxons did, and have no idea of settled property nor cultivation of the soil, have no idea of regular law, nor of that supreme and sovereign

<sup>1</sup> Thus Sir F. Palgrave says, "So soon as the royal authority became developed among any of the barbarians who settled upon the Roman ground, all their kings took upon themselves, as far as they could, to govern according to the spirit of the Roman policy, and agreeable to the maxims prevailing in the decline of the empire and declared as the imperial law. This copy of the Roman majesty was very rude and inartificial. The 'witan' of the Anglo-Saxon and other of the barbarian kingdoms used the codes and rescripts of the emperors as their church architects attempted to imitate the models afforded by the sacred structures of imperial Rome." "This assumption of power, however," he goes on to say, "was not unchecked or uncontrolled. While the kings of the barbarian nations were striving to clothe themselves with an imperial authority, the people, or the communities or bodies of people which they governed, strove equally to maintain their own Germanic freedom; and the nobles in particular were fully able to resist all the coercion from the royal power. The infusion of Roman or Romanised doctrines into the administration did not derogate from the full exercise of all the laws and legal customs of the barbarians, which they considered as their birthright and best privilege. Taking these things together, we must consider the practical government of the state as resulting from two opposite principles, often discordant, and sometimes entirely hostile to each other: Roman law, which the king tried to introduce into the administration, and a Germanic law or usage upon which that Roman law was imposed" (*Hist. of the Anglo-Saxons*, c. iv.) The philosophical Guizot gives a very similar representation of the contest between Roman law and barbarian usages, a contest not terminated until long after the Norman Conquest.

power which is its foundation,<sup>1</sup> and hence they have only some rude usages rather than laws, popular assemblies instead of regular judicature, a rough kind of arbitration instead of regular law.

A barbarous tribe, who had neither cities nor cultivation nor civilisation, could not have originated civil institutions,<sup>2</sup> which it would be absurd to attribute to them, when it is an undoubted fact that the Romans had been at pains to implant their laws and institutions, and had left them here on their departure, along with their language and their laws.

The Saxons, therefore, did not bring any institutions or laws worthy of the name with them. They brought only rude barbarian usages, as will be seen in their written laws, which express for the most part their own usages: such, for instance, as the ordeal. It is manifest that they created nothing civilised.

On the other hand, it is equally clear that they destroyed nothing

<sup>1</sup> Thus Montesquieu says: "C'est le partage de terres qui grossit principalement le code civil. Chez les nations où l'on n'aurait pas fait ce partage, il y aura très peu de lois civiles. On peut appeler les institutions de ces peuples des mœurs, plutôt que des lois" (*De l'Esprit des Loix*, l. xviii. c. 13). He adds: "Ces peuples jouissent d'une grande liberté, car comme ils ne cultivent point les terres, ils n'y sont point attachés ils sont errants, vagabonds," &c. (*Ibid.* c. 14). And then he applies this to the Germans, and cites Tacitus and Cæsar: "Nec regibus libera, aut infinita, potestas: cæterum neque animadvertit," &c. (*De Moribus Ger.*) "In pace nullus est communis magistratus; sed principes regionum atque pagorum inter suos jus dicunt" (*De Bell. Gall.*, lib. vi.) So Guizot. "How can it be maintained that German society was well nigh fixed, and that the agricultural life dominated there, in the presence of the very fact of migration, of invasion, of the incessant movement which drove the Germanic nations beyond their territory? How can we give credit to the empire of manorial property, and of the ideas and institutions which are connected with it, over men who continually abandoned the soil in order to seek fortunes elsewhere" (*Hist. de Civiliz. en France*). There was but the beginning of agricultural life, and that only by the means of slaves: "Servis non in nostrum morem descriptis per familiam ministeriis, utuntur: Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, ut colono, injungit, et servus hactenus paret" (*De Morib. Germ.*)

<sup>2</sup> What could such a race know of either civic institutions, or of such a system as that which the Romans had for the cultivation of the rural districts, and which they always established in their colonies? There were as many as nine of their civic colonies established in this country, and they were centres of civilisation, not only by their civic institutions, but by those rural institutions by the means of which they cultivated the surrounding country. Thus of one, the most ancient and important of these colonies—Colchester—the historian says, in narrating the rebellion, "Quippe in coloniam Camalodunum recens deducti, pellebant domibus, exturbabant agris, captivos, servos appellando" (*Tac. An.*, lib. 14). So the historian, speaking generally of the enlightened rule of Agricola, says, "Jam vero principum filios liberalibus artibus erudire, et ingenia Britannorum studiis Gallorum anteferre, ut qui modo linguam Romanam abnuebant, eloquentiam concupiscerent, inde etiam habitus nostri honor et frequens toga," &c. (*Tac. Agric. Vita*).

civilised ; that is, they destroyed no existing institutions ; they eradicated none of the existing laws or usages, in which lay so much of Roman law. They neither created nor destroyed ; they adopted and appropriated, trying, no doubt, to mix up their own barbarous usages, which, however, it was found, as will be seen, would not coalesce or unite with civilised institutions, so that this baser matter soon fell off, and left the entire fabric of Romanised laws and institutions, save that the Saxons infused into the Roman institutions their own rough spirit of freedom, which gave them fresh life and vigour. But they did not destroy the Roman laws and institutions. The notion that they did so arose from an erroneous idea as to the nature of their invasion. It is imagined that there was a sudden and sweeping Saxon conquest, and hence it is supposed that institutions entirely perished and disappeared. The conquest of the country by the Saxons was a slow and gradual process, extending over five centuries, and scarcely completed when the Danish invasion occurred. And during that long period, there was of course, to a great extent, an amalgamation between the races and a mixture of usages and laws. Guizot points out how fallacious it is to suppose that these barbaric conquests of a country are ever so rapid and complete as to effect any general and sweeping revolution ; and he also points out that in those early times, when, of necessity, the country, being thinly inhabited, contained large tracts of unoccupied land, it would naturally be here that the successive tribes of invaders would settle down, leaving the cities and towns, which would be stronger and more thickly populated, to subsequent acquisitions ; and the Saxon chronicle shows that this was so in this country, and that the conquest took centuries, by which time the two races and their usages were greatly merged.<sup>1</sup>

Thus it was, as the great historian of European civilisation pointed out, with the barbarian invasions generally. They were gradual and progressive. "Hence it happened, Roman society," says Guizot, "had not so completely perished (in the south of Gaul) as elsewhere ; a little more order and life remained in the cities. There civilisation attempted to lift its head. Roman society had acted upon the Goths, and had, to a certain degree, impressed them with its likeness" (*Lectures on Civilisation*, Lect. iii. p. 57). "There remained in the towns many wrecks of Roman institutions. There is mention made of public assemblies and municipal magis-

<sup>1</sup> Lect. sur la Civilization.

trates. The affairs of the civil order, wills, grants, and a multitude of acts of civil life, were legalised in the curia by its magistrates, as was the case with the Roman municipality" (Lect. vii. p. 131). "The spirit of legality, of regular association, came to us from the Roman world, from the Roman municipalities and laws" (Lect. vii. p. 432). "The towns, the primitive elements of the Roman world, survived almost alone amidst its ruin. The rural districts became the prey of the barbarians. It was there that they established themselves with their men; it was there that they were about to introduce by degrees totally new institutions, and a new organisation" (p. 440).

Thus it followed, that through the long period occupied by the Saxon invasions, there was ample time for amalgamations of races and of usages, of laws and of institutions; and there was not any sudden and general wreck of Roman institutions, as is often supposed, but, on the contrary, a gradual and progressive adoption of them; the more so, as the Saxons, being little better than savages, had no civilised institutions of their own.

Since the time when Reeve wrote, the most learned works have been written which have shown the influence of Roman laws and institutions upon those of a later age. Thus, for instance, the *History of the Roman Law in the Middle Ages*, by Savigny, a work the purpose of which was to show that the Roman law never perished in Europe, but is to be met with throughout the period extending from the fifth to the thirteenth centuries in a multitude of institutions, laws, and customs. This great work was followed up by the great work of Guizot, on the *Civilisation of Europe*, in which it is thus spoken of:—"The work of Savigny, on the history of the Roman law after the fall of the empire, has changed the face of the science; it has proved that the Roman law had not perished; and that, notwithstanding great modifications, without doubt, it was transmitted from the fifth to the fifteenth century, and has always continued to form a considerable part of the legislation of the west" (*Lectures sur la Civiliz. en France*, Lect. xxx.) And the illustrious Guizot himself attests the truth of this: "It follows evidently from the facts laid before you, that not only in municipal institutions and civil laws, as Savigny has proved, but in political order—in all departments of social and intellectual life, the Roman civilisation was transmitted far beyond the date of the empire; that we may everywhere discern a trace of it; that

the thread is nowhere broken ; that we may recognise everywhere the translation of Roman society into our own ; in a word, that the part played by the ancients in modern civilisation is greater and more continuous than is commonly thought" (*Ibid.*)

And the great writer confirms this conclusion by drawing our attention to the gradual character of the conquests by the barbarians, which is peculiarly true of the successive Saxon invasions in this country, occupying as they did a period of not less than five centuries ; and the subjugation of the country not being entirely completed, even at the time of the conquest, during the whole of which period an amalgamation of races and institutions was going on. The natural result of all this would be, that, so soon as the barbarians were civilised enough to aspire after regular law, they would soon begin, by degrees, to resort to the Roman. "After the conquests of the barbarians," says Guizot, "there remained considerable wrecks of the Roman civilisation. The name of the empire, and the recollections of that great and glorious society, disturbed the memories of men, particularly of the senators of towns, of bishops, and of all those who had had their origin in the Roman world. Among the barbarians themselves, or their barbaric ancestors, many had been witnesses of the grandeur of the empire : they had served in its armies ; they had conquered it. The image and name of Roman civilisation had an imposing influence upon them, and they experienced the desire of imitating, of reproducing, of preserving something out of it" (*Lectures sur la Civilization*, Lect. iii.)

This, certainly, was not less likely to be true in this country than in Europe generally. Accordingly, as the same great writer remarks, the earliest efforts at legislation among the barbarians were soon felt to be rude and inadequate to the state of things they found existing. "One is surprised," says M. Guizot, "that the permanence of the Roman law, after the fall of the empire, should ever have been doubted. Not only do the barbaric laws everywhere make mention of the Roman laws, but there is scarcely a single document or act of that epoch which does not, directly or indirectly, attest their daily application. It was the Pandects which reappeared in the twelfth century ; and when people have celebrated the resurrection of the Roman law, it is of the legislation of Justinian they have spoken, not the perpetuity of other portions of the Roman law in the west ; the Theodosian code, for instance, and all

the collections of which it was the basis" (*Lect. sur la Civilisation*).

This would be the natural result, and was the actual result, of the manner in which the Saxon Conquest was ultimately, after ages, effected, viz., that the conquered race simply became their tributaries.<sup>1</sup> There could be nothing in this to disturb or destroy the existing institutions, rural or municipal. The Saxons established themselves in the manors, and adopted the manorial system. By degrees they conquered the towns, and preserved the municipal system. There is no trace either of their creation or destruction of either system. They, indeed, established a system of frankpledge, which led to the formation of "boroughs;" but they did not destroy the privileges of the cities. On the contrary, the first Saxon monarch (Athelstane) who professed to reign over the whole Saxon portion of England—and it was but a portion—recognised the customs of the cities,<sup>2</sup> and established privileges of coinage there.

All the civil or political divisions of the country into hundreds<sup>3</sup> and counties were, there is every reason to believe, continued substantially as they before existed. The common notion that Alfred divided the country into hundreds and counties, is a vulgar error.

<sup>1</sup> Thus Lingard says, after the Saxons had formed fixed and permanent settlements, they gradually suffered the natives to retain their national institutions, and their own chiefs as subordinate and tributary. Bede gives an instance of both in Edelfred, in the year 600: "Qui terras eorum subjugatis indigenis, aut tributarias genti anglorum, aut habitabiles fecit" (*Hist. Eng.*, vol. i. c. 2). What these institutions were has been seen; they were—whether urban or rural, municipal or manorial—of Roman origin; and thus the chain of descent from the Roman time to the Saxon is distinctly kept up in legal history. It is to be observed that it was only a portion of the Britons who preserved their independence, and were driven into Wales. The greater part of Britain was subjugated and subdued by the Saxons, and the races amalgamated. (See *Sir E. Creasy's "English Constitution."*)

<sup>2</sup> See the *Laws of Athelstane I.*, s. 14; *Anglo-Saxon Laws*, vol. i., p. 207.

<sup>3</sup> The Saxon "hynden," hund, consisted of ten persons, and appears to have been formed from "hund," of which the original meaning was ten. The "hynden," therefore, will correspond to the *turba* of the civil law, "quia turba decem dicuntur," and the *tourbe* of the French coutumes, "continue si doit verifier par deux tourbes et chacun d'i celles par dix temoins" (*Louet*, liv. v., tit. 5, c. 13). And "hyndens" and "shires" are mentioned in the earliest Saxon laws (*Laws of Ina*); and, as already known, there is no mention of the establishment of either in any of the Saxon laws. Clearly, then, they were known before the Saxons, and that was the opinion of Lord Coke (1 *Inst.*, 248). Again, "shires" are mentioned as already known in the earliest Saxon laws (in those of Ina, s. 39 and 361). The notion that Alfred instituted shires and hundreds and tithings is a vulgar error. It seems probable, therefore, that the real origin of the hundreds and tithings is to be found in the Roman usages introduced among the Britons. This seems to have been supposed in the Saxon times: see the *Mirror of Justice*, for instance. So the Saxon laws, *vide post*.

There is no trace in the Saxon laws of their formation, and they are mentioned in the earliest of them as already existing, although it is probable that the Saxon institution of frankpledge was applied to tithings.

So as to the officers of these civil divisions of the country, especially the sheriff, whose functions were from the first fiscal, and connected with the system of revenue, not of barbarian origin. It is probable, and it appears, from express statements in these laws ;<sup>1</sup> that the institutions which prevailed in this country during the period of the Roman occupation, were, in a great degree, revived and restored, and were embodied in the Saxon law.

In the earliest of the Saxon laws are to be seen constant traces of the old institutions derived directly from the Romans, and the earliest of the Saxon historians<sup>2</sup> speak of them as framed more or less in accordance with the ideas and examples of the Romans ; or of those who had been subject to them, and who had imbibed their spirit, and adopted their institutions.

It is a matter of historical fact that, no sooner was the Saxon Conquest accomplished, than, under wise monarchs, the work of

<sup>1</sup> Thus, in the laws of the Confessor, compiled soon after the Conquest, is a passage : "Et similiter olim apud Britones temporibus Romanorum, in regno isto Britannia, vocabuntur senatores, qui postea temporibus Saxonum, vocabuntur aldermanni . . . Debent enim et leges, et libertates, et jura, et justas consuetudines regni et antiquas a bonis prædecessoribus approbatas, inviolabiliter modis omnibus, pro posse suo servare." Lord Coke was of opinion that the country was divided into counties in the Roman times, and that in those times also are to be found the origin of our towns, cities, and boroughs, of which there can be no doubt. He also was of opinion that there were præfects or consuls, and sub-præfects or vice-consuls, to the counties ; and that the sheriff (Saxon shire-reeve), by the Normans called viscount, and in Latin vice-comes, would, under the Romans, have been sub-præfect. That there were such officers in Roman times no one can question. That they would remain during the long period in which the Saxons were gradually and slowly acquiring dominion in the country, there can be as little doubt ; and that the Saxons, as they thus acquired dominion and became civilised, would retain them, giving them the Saxon names, is most probable. It is thus, Lord Coke conjectures, the consul became the earl, and the vice-consul the sheriff, and probably the modern lord-lieutenant is the nearest approach to the ancient Saxon earl or Roman præfect of a province, or county, or shire. And Alfred only revived these divisions and institutions (1 *Inst.*, sec. 248).

<sup>2</sup> Thus Bede speaks of Ethelbert, whose laws are among the earliest : "Qui inter cætera bona, quæ genti suæ consulendo conferebat, etiam decreta illi judiciorum, juxta exempla Romanorum, cum consilio sapientium constituit ; quæ conscripta anglorum sermone hactenus habentur, et observantur ab ea ; in quibus primitus posuit, qualiter id emendare deberet, qui aliquid rerum vel ecclesiæ vel episcopi, vel reliquorum ordinum facto auferret ; volens scilicet tuitionem eis, quos et quorum doctrinam susceperat, præstare" (*Hist. Eccles.*, ii. 5).



consolidation and civilisation was commenced, the Roman institutions and divisions of government were adopted, and the terms they had used were employed.<sup>1</sup>

As might naturally be expected, so soon as the Saxons became civilised enough for anything like law, they resorted to the laws of the Romans. As an eloquent writer has justly and truly remarked : "The inheritance of Roman wisdom was transmitted to the fierce barbarians of the west, and, as they wrought the materials of the temple and amphitheatre into their own rude fortresses and dwellings, so did they occasionally incorporate the precious fragments of Roman law into their own unformed and scanty jurisprudence. This, however, they sometimes did unconsciously, and, at most, against their will. But when society improved, men looked on the Roman law with increasing veneration, as the surest basis of civil order" <sup>2</sup> (*Phillimore's Introd. to Roman Law*, p. 11).

<sup>1</sup> Thus in the laws of Ina we find mention of the "aldermanni, quam Latine comitem vel seniores dicunt" (s. 40). And in the laws of Edward, the king commands "omnibus prefectis," and he declares that he who shall have deforced any one should do right, "coram preposito suo;" and again, "de prepositis audito testimonio rectum facere volentibus" (s. 5); and again, "ut omnis prepositus habeat genotium ad quatuor ebdomadas;" whence it is plain that the "præfectus" or "prepositus" answered to the Saxon sheriff, and that the Saxon sheriff was the Roman prefect. So the "comes" is spoken of as equivalent to the Saxon alderman or earl (*Anglo-Saxon Laws*, vol. ii. p. 485). It is impossible not to see that Roman words were used as describing the certain officers or functionaries, which could only have been from their already existing at the time of the Saxon invasion.

<sup>2</sup> The epoch of barbarian legislation, the learned author adds in a note, reaches from the fifth to the tenth century, including the laws of the Anglo-Saxons (*Ibid.*), which implies that the law prevailing here before was not barbarian. A similar account is given by Guizot (*Hist. de la Civilization en France*, vol. i., p. 30), a work of which it has been well said, "France may be proud." "Should we open," says Guizot, "a barbarian code, we shall everywhere find the traces of the Roman society, of its institutions and magistrates, as well as of the civil legislation. The municipal system occupies an important place in it; the curia and its magistrates meet us at every step, and attest that the Roman municipality still subsisted and acted. And not only did it exist, but it acquired more importance and independence. At the fall of the empire, the governors of the Roman provinces—the præses, the consulares—disappeared. In their place we find the barbarian counts. But all the attributes of the Roman governors did not pass to the counts; they made a partition of them. Some belonged to the counts, and these in general were those in whom the central power was interested, such as the levying of taxes, &c.; the others, which only concerned the private life of the citizens passed to the curia and the municipal magistrates" (*Lectures sur la Civiliz. en France*, Lect. ii.) This was written of Gaul, but it was as true of Britain, which formed part of the same prefecture; and we find the vice-comes, or sheriff in this country, exercising a portion of the functions here described as having belonged to the Roman officers of the empire, especially in relation to the taxes, &c., while the "comes" succeeded to the "consul or prætor."

That our *municipal* institutions had a Roman origin is not to be doubted, and is acknowledged by the most eminent historians.<sup>1</sup> Nor was it only *municipal* corporations which we owe to the Romans, although these, as Guizot points out, were the nurseries of freedom, of commerce, and of civilisation (*Lectures sur la Civiliz. de l'Europe*, Lect. vii.) There were other corporations, such as guilds or trading confraternities, which are usually ascribed to the Saxons, but which, as that great author shows, we really owe to the Romans. And the way in which they arose well illustrates the silent, unobserved growth of laws and constitutions. He says, "By one of those revolutions which work on slowly and unseen, until they become accomplished and manifest at a particular epoch, whose course we have not followed, and whose origin we never trace back, it happened that industry threw off the domestic menial character it had so long borne, and that, instead of slave artisans, the world saw free artisans. This was an immense change in the state of society, a change pregnant with incalculable results. When and how it was operated in the Roman world, I know not; but at the commencement of the fifth century it was in full action. There were already in all the large towns of Gaul (the prefecture which included Britain) a numerous class of free artisans already created into corporations, into bodies formerly represented by some of their own members. The majority of these trade corporations, the origin of which is usually assigned to the Middle Ages, may readily be traced back to the Roman world" (*Lect. sur les Civiliz. France*, Lect. ii.) And it is beyond a doubt, though not so generally understood, that the Roman system was the origin of our manorial institutions.<sup>2</sup>

<sup>1</sup> Thus Sir James Mackintosh says, "One part of the Roman institutions had permanent consequences, of which we trace the fruits at this day. This was their care in providing for the government and privileges of towns. Thirty-three towns were established in this country, with various constitutions. The choice of the decurions, or senators, out of whom the magistrates were taken, was left to the inhabitants. To these magistrates belonged the care of the public worship, the municipal property, and the local police, together with some judicial powers. Whatever may have been some of the consequences which are attributed to the condition of these subordinate republics, it cannot be doubted that the remembrance and the remains of them contributed to the formation or preservation of their elective governments, customs which were the foundation of liberty among modern nations" (*Mack. Hist. Eng.*, vol. i. p. 25).

<sup>2</sup> What Guizot says of the Gaulo-Romans is just as applicable to the Britanno-Romans. "They first established themselves in the habitations, whether in the cities or in the *villæ*, amidst the country districts, and the agricultural population; and rather in the latter dwellings, whose situation was most conformable to their national habits. Accordingly, the *villæ*, of which constant mention was made

That the system existed here when the Saxons came has been already shown ; that they would adopt it, would, *à priori*, be probable ; and as a certain fact, that they did so, the great author already quoted observed. " The Saxon invaders would, as they seized upon the villas or mansions, and the manors or estates, adopt that system of cultivation and tenure which they found existing, and would soon find to be the most convenient, and thus the manorial institutions would become as much the centres of civilisation in the country as the municipal in the cities.

The same great author shows how gradually the Roman institutions grew upon the barbarians, and by degrees got rooted beside their own. " Since we have studied the barbarian laws, we advance more and more to the same result ; the fusion of the two societies (*i.e.*, the Roman and the barbarian) becomes more and more general and profound ; the Roman element, whether civil or religious, dominates more and more. . . . It exercises a prodigious influence over the institutions and manners which associate themselves with it ; it gradually impresses on them its character ; it dominates over and transforms its conquerors. . . . In fixing themselves and becoming proprietors, the barbarians contracted among themselves relations much more varied and more durable than any they had hitherto known. Their civil existence became much more extensive and permanent. The Roman law alone could regulate it ; that alone was prepared to provide for so many relations. The barbarians, even in preserving their customs, even while remaining masters of the country, found themselves taken, so to speak, in the nets of this learned civilisation, and found themselves obliged to submit in a great measure, doubtless not in a political point of view, but in civil matters, to the new social order" (*Lect. sur la Civiliz. en Europe*).<sup>1</sup>

In the early Saxon laws and institutions there is no trace of the

under the first race, were the same, or almost the same, as they had been before the invasion ; that is to say, they were the centre of improvement, and habitation of great domains and buildings, scattered throughout the country districts, where barbarians and Romans, conquerors and conquered, masters, freemen, labourers, slaves, lived together" (*Lect. sur la Civiliz. en France*, Lect. 4). It is manifest that thus the manors would become centres of civilisation in the country, as much as the municipal in the cities ; and both were of Roman origin.

<sup>1</sup> Les barbares, tout en conservant leurs coutumes, tout en demeurant les maîtres de pays—se trouvèrent pris, pour ainsi dire, dans les filets de cette législation savante et obligés de lui soumettre en grande partie, non sans doute, le point de vue politique, mais en matière civile, le nouvel ordre social (*Lect. sur la Civ.*, vol. iii. 386).

establishment of a *manorial* system; and it is beyond a doubt that they found it here and adopted it. The earliest of the Anglo-Saxon laws make allusions to a state of things and a class of tenants necessarily involving the existence of the system. It is manifest that the villeins, or villani, who are admitted to have been the originals of the modern copyholders, were identical with the Saxon ceorls and the Roman "coloni;" and thus it is shown that manors were of Roman origin, since copyholds were held of manors by immemorial usage and the custom of the manor.<sup>1</sup>

Thus, then, all the more important and influential institutions of the country, civil or ecclesiastical—the municipal, the manorial, the parochial, and the episcopal—none of which, except the *obligation* of tithes and other ecclesiastical dues,<sup>2</sup> were established by the Saxons, but were found existing here, and simply adopted by them, were derived from the Romans. So as to the law, written or unwritten, all of it which can be deemed worthy of the name of law, was derived from the same source.

It would be a great mistake—but it is one into which our author and most other writers on our legal history have fallen—to imagine that all the law of this country in Saxon times was contained in the Saxon laws. These were the *leges scriptæ*;<sup>3</sup> but beyond and above these there was a great body of law, far

<sup>1</sup> Thus, for instance, in the laws of Ina there is a section "de colono regis" (s. 19), and another "de colono vel villano." *Si tuus colonus vel villanus furetur*; so that the "colonus" and the "villanus" were spoken of as identical (s. 22). And in another, headed "De villani mansione claudenda," the villani are called "ceorls" (s. 40); and so, in another, "De villanorum pascuis claudendis;" it commences, "Si ceorli habeant herbagum," &c.; so that here, again, the "ceorls" and the "villani" are spoken of as identical, and the ceorls, villani, and coloni are clearly identified with each other. Thus it is demonstrated that manors were of Roman origin, and the whole system of copyholds (*Anglo-Saxon Laws*, vol. ii. p. 461). At the time of the Conquest, it was well understood that the "villani," as they were then called, were those who held land upon servile tenure, such as tilling the soil, taking care of cattle, &c. (*Anglo-Saxon Laws*, vol. ii. p. 433); and after the Conquest, they were well understood to be the "coloni" of the Roman times. "Coloni" are then spoken of as "terrarum exercitores;" non vexentur ultra debitum et statutum; nec licet dominis removere colonos a terris, dummodo debita servitia persolvant (*Laws of William the Conqueror*, s. 29). It is well understood, and is stated by Guizot, that the "coloni" of the Romans were identical with the "villeins" of the later times; and in the Latin versions of the Saxon laws they are called "villani," while, in the Saxon version, they are "ceorls" (pronounced "churls"), or husbandmen.

<sup>2</sup> As, the payment of church-scot (*Laws of Ina*); and Peter's pence (*Laws of Edgar*).

<sup>3</sup> This distinction between the *lex scripta* and the *lex non scripta* was itself derived from the Roman law, and is laid down in Justinian's Institutes at the outset. The Roman ecclesiastics were well aware of this, and of the value of tradition.

more valuable and influential, which was unwritten, and derived by tradition from the Romans. Much of it was embodied in the institutions they had established, political or social, as the municipal and the manorial. And there was much more, derived by tradition from the Romans.

It would be a great error to suppose that the Saxon laws contained all the law the Saxons had. They derived a whole system of laws and institutions from the Romans; their written laws were only *additions* thereto, and for the most part rude and barbarous. When the Saxons, like the other barbarian nations which had conquered portions of the Roman empire,<sup>1</sup> became desirous of forming a regular law, they could do no more at first than put into writing their own barbarous usages. But by degrees they became sensible of their barbarism; they learnt a better law, and there grew up among them an unwritten law, derived from the traditions of the Roman law, which remained when their own rude written laws had become obsolete. And hence a constant struggle after something better—a continual tendency towards the laws and institutions of Rome. In treating of the various attempts at extricating European society from barbarism, the same great writer says: “The first attempt made, though but slightly effective, must not be overlooked, since it emanated from the barbarians themselves, was the drawing up of the barbaric laws. Between the sixth and eighth centuries the laws of almost all the barbarous people were written. Before this they had not been written; the barbarians had been governed simply by customs, until they had established themselves upon the ruins of the Roman empire. We may reckon the laws of the Saxons. There was manifestly a *beginning* of civilisation—an endeavour to bring society under regular and general principles. The success of this attempt could not be great; it was writing the laws of a society which no longer existed—the laws of the social state of barbarians before their establishment upon the Roman territory, before they had ex-

<sup>1</sup> “Lorsque les nations germaniques conquièrent l’empire romain, elles y trouvèrent l’usage de l’écriture; et, à l’imitation des Romains, elles redigèrent leurs usages par écrit; et en firent des codes. Les invasions, les guerres intestines, replongèrent les nations victorieuses dans les ténèbres dont elles étaient sorties, on ne sut plus lire ni écrire. Cela fit oublier les lois barbares écrites, le droit romain. Et par la chute de tant de lois, il se forma partout des coutumes. Ainsi, comme dans l’établissement de la monarchie on avait passé des usages des Germaniques à des lois écrites, on revint, quelques siècles après, des lois écrites à des usages non écrits” (*Mont. Esprit des Loix*, lib. ii. 8, c. 11).

changed the wandering for the sedentary life; the condition of nomade warriors for that of proprietors. We find indeed here and there some articles concerning the lands which the barbarians had conquered, and concerning their relations with the ancient inhabitants of the country; but the foundation of the greater part of these laws is the ancient mode of life—the ancient German condition; they *were inapplicable to the new condition*, and occupied only a trifling place in its development” (*Ibid.*)

All this was eminently true of the Saxons in this country, and their earlier laws, which bear the traces of their rude and savage state, and are obviously only the first attempts at anything like settled law. And though they allude to institutions as already existing, such as the “hundred” and the court of the hundred, there is no trace of their having themselves introduced or established any but the most barbarous usages, as the ordeal, compurgation, &c. And if Alfred’s institution of frankpledge be an exception, it appears to have been founded upon an organisation already existing.

As regards all *secular* institutions, indeed, beyond the mere adoption of the municipal or manorial institutions, which the Saxons found here, there is nothing in their laws except rude and barbarous usages, save so far as they had derived some first principles and elementary ideas of law from Roman sources. Thus as to the general principles of jurisprudence, and the administration of justice, there can be no question that they were derived by the Saxons from the Roman system, although doubtless in a very rudimentary form. Thus, for instance, as to the fundamental principle, which lies at the basis of all law, the supremacy of public justice over private revenge,<sup>1</sup> a principle so utterly antagonistic to the usages and ideas

<sup>1</sup> As Guizot observes, the German notions of law, as exemplified in the earlier Saxon laws, did not rise so high as the prohibition of private revenge; it only sought to mitigate it by levying it off, so to speak, under a system of pecuniary fines or compensation. But in the laws of Ina we find the great principle laid down which lies at the basis of all law; that a man must demand justice before he takes revenge, even when that revenge is allowed by law, as in the instance of a distress damage peasant, a relic of the old national law still remaining in our law (*Laws of Ina*, s. 9). If any one committ the offence of forcible seizure of land, and ouster of another, he should give up what he had seized, and pay a fine to the king (*Laws of Ina*, c. 10). So if any one take revenge, *i.e.*, a distress, before he demand justice, let him give up what he has taken and pay damage. Here was the principle. It was afterwards developed. The best comment upon this is afforded by a reference to the statute of Marlbridge (*temp.* Henry III.), in which the same principle is laid down and enforced. “Et nullus de cætero ultiones aut districtiones faciat per voluntatem suam;” and upon which Lord Coke’s comment is, “Ultiones; that therefore they (refusing the

of barbarians like the Saxons,<sup>1</sup> it will be found laid down for the first time as Saxon law, enacted after the Roman influence had revived. Enacted no doubt in simple cases, and in an elementary form; but still there was the germ which afterwards grew, the principle ultimately developed.

So as to the next great principle, that the duty of securing that justice should be administered rested with the sovereign, and that in case of failure or defeat of justice in the local and popular tribunals, the sovereign power must provide for and enforce it. This principle also, plainly derived from the Roman system, as it rather ran counter to the original Saxon institutions, is scarcely to be found in the earliest Saxon laws, though it by degrees was recognised and developed.

So as to the important principle of the origin of right and property in land, as derived from the sovereign, and reverting to him, by way of forfeiture, on breach of allegiance. This, like the other great principle, that justice was the prerogative of the crown, was of Roman not of Saxon origin; and is to be found at first obscurely implied, and then gradually arising in the Saxon laws, and implied, though imperfectly and obscurely, in various ways.<sup>2</sup>

course of the king's laws) took upon them to be their own judges in their own causes, and to take such revenges as they thought fit until they had ransom at their pleasure." That is taking distresses not according to law, as for services, rents, or damage feasant, but for revenge, without lawful cause. Here we see how the ancient law illustrates the later.

<sup>1</sup> The Saxon tribunals, those of the county or hundred, were merely rude and noisy assemblies. They could not all at once be got rid of, since the barbarians clung to their native usages; but in the Saxon laws which show the first signs of reviving civilisation, there is a provision which indicates rather a jealousy of the royal prerogative to enforce justice; though perhaps, on the other hand, it may be deemed to contain the germ of a better system. It was provided that if any one demand justice before a shire man, or other judge, *i.e.*, the ealderman or hundredor, and cannot obtain it, and the other will not give him security, let him pay a fine, and within so many days do justice; the breach of which would be an offence against the general law, which the king could visit (*Laws of Ina*, s. 8). And the same provision is to be found in subsequent laws (*Canute*, s. 17). In the laws of Edgar, provision is made for the regulation of fine or forfeiture to the king, in case of disregard of the courts of the hundred (*Laws of Edgar II.* 7); and there is also mention made of outlawry, the effect of which was to put a man out of the protection of the law, and his property in the power of the king (*Ibid.*) So a law of Athelstane: if the lord denies justice, and the king be appealed to on that account (*Athelstane*, s. 3). So a law of Ethelred, that no man made a fine for any accusation, except it be with the witness of the king's reeve (*Ethel.*, s. 1). It is obvious that the principle was gaining ground, that justice was the king's prerogative.

<sup>2</sup> These two principles are closely connected, and lie at the basis of any settled system of government. Thus in the laws of Ethelred, it is laid down that the king is entitled

So as to the transfer of land by donations or deeds,<sup>1</sup> which are alluded to in the Saxon laws; and the use of charters, or deeds, by way of grant or conveyance, all which must have been of Roman origin, seeing that such transfers could not have existed among the Saxons in their native state, in which the very idea of settled property itself could hardly have arisen; nor could deeds or written instruments have been used among a people whose very king could neither read nor write.

So as to the whole subject of the dominion over land, or the possession or occupation of land, and the rights which long use or possession might confer, or contracts for the use and occupation of land, all heads of law which could never arise in a country which had not reached a certain stage of civilisation and ideas of settled property, to which the Saxons certainly had not attained when

to the penalties that those incur who have "bocland," i.e., freehold land held of no one, but thus regarded as held really under the crown; a plan and system of the Roman principle, that property in land could only be derived from the sovereign power of the state, and held under its sanction (*Ethel.*, s. 1). So if a man fled from his lord, he was to forfeit all he had, and the lord might seize his possessions, but if he had bocland, that was to go to the crown (*Can.* s. 78). So in another law the bocland was to be forfeited to the king (*vide ibid.*) The very distinction between bocland or land conferred or conveyed by deed or written instrument, and as distinct from land simply held in common folkland, must have arisen among the Saxons subsequent to their arrival in this country, when they certainly could have no deeds, and writing was unknown even to their kings. Moreover, the very idea of a deed granting and delivering an estate or land implies an idea of different estates or kinds of property in land, far too complex for barbarians, and which it is natural to suppose came from the Romans; the distinction in question being known to the Romans.

<sup>1</sup> The whole subject of donation, it need hardly be stated, is treated of profusely in the Roman law, entire tables of which have been transferred to our own, as, for instance, *donatio mortis causa*. The idea of donation, however, involves property, and settled property in land could scarcely have existed among the Saxons in their native country, still less could donations by deeds or instruments in writing have been known among the people, whose kings, it is clear, could not write, since their charters, mentioned in the Saxon laws, were always signed by them as marksmen. Instances, however, of such deeds are to be met with in the Saxon chronicles as early as the seventh century, always associated with ecclesiastics, who, doubtless, drew them up, and derived them from the Roman law. It is mentioned as a most remarkable thing of Alfred that he could read; and in his time there is a Saxon law which shows that deeds of grant were used. "The man who has bocland, and which his kindred left him, must not give it from his kindred, if there be writing or witnesses that it was forbidden by those men who at first acquired it, and by those who gave it to him, that he should not do so; and then let it be declared in the presence of the king and the bishop before his kinsmen." This was the Saxon mode of transfer by public declaration or delivery, and the instruments or deeds were obviously of Roman origin. "*Si scriptam intersit testamenti, et testi, quid eorum prohibuerit qui hunc adquisierit,*" &c. The idea of conditional donations was far too artificial to have been invented by a rude race like the Saxons, and was plainly derived from the Roman law (*Pand.*, lib. xxviii.) through the traditions of the Romanised Britons.



they originally invaded Britain, and all treated of fully on the Roman law; there can be no reasonable doubt that the provisions on such subjects contained in the Saxon laws were derived from that source, though, no doubt, at first in an elementary form, and in the simplest possible cases.<sup>1</sup>

Thus, therefore, on these different subjects, so important as lying at the basis of any system of law—the only traces of law the written laws of the Saxons had—were derived from the Roman law; and these are the only portions of their laws not barbarous. These portions of the Saxon written laws, however, are but few and fragmentary; and the bulk of the laws will be found to have been either more barbarous usages, or moral and religious precepts, inserted by the ecclesiastics who framed them, and which belong rather to the moral law than to the municipal. The little that is in them that deserves the name of law, is clearly of Roman origin, and that portion is but small. The rest of their law—that is, the great bulk and body of civilised law among the Saxons—must have been derived from the Romans by tradition.<sup>2</sup>

There was, indeed (as already hinted), one great benefit derived from the Saxons, and that was the infusion into our institutions of that spirit of freedom and equality which gave them fresh life and vigour, and enabled them to endure. Thus the philosophical historian, Hume, observes of them: “At the Teutonic invasion,

<sup>1</sup> Thus, as to the law of possession and dominion, the Roman law held that a man might be in possession of land occupied by his farmers or tenants as much as if he himself occupied personally (*Inst.*, lib. iv. tit. xv. s. 3; *Cod. Just.*, lib. vii. tit. xxxii.) The bearing of this principle upon the manorial system, under which lands, portions of the lord's demesnes, were held at his will, according to custom, will be obvious, and no one will suppose it had ever occurred to the Saxons; and the Roman law had always recognised as to landed property, the effect of *usucapio*, to which the Christian emperors had added the effect of prescription for a certain number of years, which Justinian made applicable to the provinces, fixing the period of prescription as to land at about twenty years—the very period which, from time immemorial, raised a possessory right, according to our common law. This, again, is far too artificial to have arisen among the Saxons. So as to the whole law of servitudes to which land may be subjected, it is essentially of Roman derivation. So as to leases of land at a rent, as to which there is a provision in the laws of Ina with reference to emblements, where the landlord had terminated a tenancy after a crop was sown (*Laws of Ina*, c. 67).

<sup>2</sup> These laws are divided for the most part into provisions as to pecuniary compensation for bodily injuries, the ordeal and other barbarous usages, and pious precepts as to the observance of moral and religious duties. It is not too much to say that there is not any piece of municipal law except either such few fragments of Roman law as have happened to get in, or such provisions as relate to the assemblies of the hundred and the county, which were really mere turbulent popular meetings, utterly unfitted for any judicial duty.

Europe, as from a new epoch, rekindled her ancient spirit; and if that part of the globe maintains sentiments of liberty, honour, equity, and valour superior to the rest of the world, it owes these advantages chiefly to the seeds implanted by these generous barbarians" (*Hume's Hist.*, vol. i., Appendix).

The great French writer, Guizot, has expressed similar opinions: that the benefit we derived from the barbarians was the spirit of freedom. This spirit was embodied in this country in the popular tribunals introduced by the Saxons in their county courts. Guizot described how, at the decline of the Roman empire,<sup>1</sup> the spirit of despotism had prevailed, and destroyed the energy of nations. And our own acute historian, Sir J. Mackintosh, has described the Saxon spirit of freedom<sup>2</sup> infused into their popular tribunals, breathing life, and vigour, and energy into all their institutions.

It was out of these popular tribunals was afterwards derived the system of trial by jury, which had, no doubt, originally belonged

<sup>1</sup> Guizot thus describes the state of things towards the close of the empire:—"The governors—the Emperor's immediate representatives, charged throughout the empire with the interests of the central government, with the collection of taxes, and the whole executive power—by degrees absorbed the judicial, not only as between the sovereign and the subject, but as between the subjects themselves. The whole civil and criminal jurisdiction was in their hands. With two exceptions, they adjudicated all suits; in the first ages, the governor deciding only the law, and appointing a private citizen called the *judex*, or juror, to decide on the question of fact; but by degrees a despotism established itself, and the ancient liberties of the people disappeared, the intervention of the *judex* became less regular, and the institution fell into disuse. The entire jurisdiction, then, in all cases, appertained to the governors, agents and representatives of the Emperor in all things, and masters of the lives and fortunes of the people, with no appeal from their judgment but to the emperor in person. Thus the jurisdiction of the governors comprehended all things, all classes of society" (*Guizot, Lect. sur la Civ.*, v. i.; *Gibbon*, c. ii.)

<sup>2</sup> "The meetings of the people at the courts of shires, hundreds, and tithings, at which the humbler classes were necessarily more important than in the ordinary assemblies, contributed still more to cultivate the generous principles of equal law and popular government; and though trial by jury was then unknown, it cannot be doubted that the share of the people in these courts, where all ordinary justice was administered, must have led the way to that most democratical of juridical institutions. It is an ingenious and probable conjecture that the smaller of these courts produced the assembly immediately above it in regular order. In their original seats, indeed, we learn from Tacitus that there were hundredors in the district, as well as in the supreme assemblies of the whole people" (*Hist. Eng.*, by Mackintosh, v. i. p. 81) "The spirit of equity and freedom breathed into our government by the Saxons has never entirely departed from it, and we follow their example still, employing legal and aristocratic temperaments to render the ascendancy of the people more safe for public order, and therefore more insured against dangerous attack" (Sir J. Mackintosh's *Hist. Eng.*, v. i. p. 83; Lardner's ed., *Cab. Cyc.*) There is a passage in Guizot's lectures upon the civilisation of France, in which that thoughtful and philosophical writer finely describes the distinguishing elements or agencies in that European civili-

to the Roman system, but had declined and died away in the provinces under the stipendiary influence of despotism, and was destined to be revived by degrees in a far more vigorous form through the medium of the popular tribunals of the Saxons. It was, however, by a long, a slow, and a laborious process that this was effected, and the rough popular assemblies, as established by the Saxons were far remote from anything like judicial tribunals. There was, however, an element in them which ultimately led to the restoration of legal tribunals and judicial trials, and that was the presence of the bishops in these assemblies. It was indirectly through their influence that these popular assemblies were by degrees transformed, and that an intelligent administration of justice restored by infusing the Saxon spirit into Roman institutions.

To understand this it is necessary to attend to the state of ecclesiastical institutions among the Saxons. The country had already been divided into ecclesiastical dioceses,<sup>1</sup> during the

sation ; and it applies equally to this country. He says : " The spirit of legality, of regular associations, came to us from the Roman world, from the Roman municipalities and laws. It is to Christianity, to the religious society, that we owe the spirit of morality ; the sentiment and empire of rule ; of a moral law, of the mutual duties of man. The Germans " (including of course the Saxons) " conferred upon us the spirit of liberty—of liberty such as we conceive of and are acquainted with it—in the present day ; as the right and property of each individual : master of himself, of his actions, and of his fate, so long as he does not injure others " (*Lectures sur la Civilization*, Lect. vii.)

<sup>1</sup> The Roman empire in its later ages had a civil system of division, which included provinces and dioceses, and when the empire became Christian, that division was adopted for ecclesiastical purposes ; and no one who has read Bede's Ecclesiastical History or other early chronicles, needs to be told that the Christian religion was established here under the Romans, and that this ecclesiastical division was established in Britain during the Roman occupation. When the Saxons were converted by the Roman ecclesiastics, this same ecclesiastical organisation was re-established, and, though in some instances the dioceses may have altered, the system was the same. So as to parishes, they would appear to have been of Roman origin, and to have existed here before the Saxon times. There can be no doubt that when the Romans became Christian, they made a regular provision for the support of the clergy ; the owners of the " villas " or country estates, afterwards called lords of manors, made such provision by means of grants of lands ; and at the same time the Roman institutions of tithes and oblations were adapted to the same object, the lords being patrons of the " livings " thus created ; and thus in an ancient legend of the time of St Augustine, to be found in the *Historia aurea* of Johannes Anglicus MS., part 2, lib. xvii. c. 72, mention is made of the *patronus villæ*, or lord of the manor, as being patron of the church, and entitled to the tithes. This was just at the end of the sixth century, and indicates at that early period such an identity with the Roman institutions as to afford the strongest evidence of an adaptation of them by the Romanised inhabitants of this country during the Roman occupation. In the laws of Ina, mention is made of church-scot ; a species of oblation, which was probably the origin of church-rates ; and which even then was compulsory, for

latter portion of the Roman occupation, when the empire had become Christian. And the division of dioceses into smaller districts, afterwards called parishes, was founded upon the manorial system, already shown to have been derived from the Romans, and was in existence here when the Saxons arrived, and were adopted by their conversion to Christianity, with the whole ecclesiastical system to which they belonged.

It will be seen by reference to the Saxon laws, that not only were the endowments of the church protected, but all its privileges and immunities as established in the imperial laws were recognised and re-established—as the right of sanctuary,<sup>1</sup> and the immunity of the clergy from secular jurisdiction.<sup>2</sup>

the law was, that church-scot shall be paid (s. 61); and though it does not say to whom, it should seem that it must have been to the priest of the parish, that is, of the “vill” or manor. Mention is made in the same laws of churches as sanctuaries (c. 57). This was in the eighth century. In the laws of Ethelbert, at the close of the sixth century, mention is made of the property of the church and of bishops and priests: and in the laws of Edgar, mention is made of tithes, which, however, existed much earlier. That tithes existed prior to the middle of the eighth century appears from one of the canons of Archbishop Egbert, A.D. 750; that tithes ought to be paid, and they are alluded to as having been declared by Augustine, “ut Augustinus dicit; decimæ igitur tributæ sunt ecclesiarum et egentium animarum” (s. 102, *Anglo-Saxon Laws*, vol. ii. p. 112). At the end of the eighth century, Offa, king of Mercia, made a grant to the church of all the tithes of his kingdom, and Ethelwulf half a century afterwards extended it to the whole realm. In the laws of Edward and Guthrum, towards the end of the ninth century, the payment of tithes and other oblations is enforced (c. 61). And so by the laws of Athelstane, about the year 930. Thus in a law of Edgar it was ordained that every tithe be rendered to the old minster to which the district belonged (the Saxon word “hynes” being in the Latin version rendered *parochia*); and it is then added, that any thane who on his boe-land had a church with a burial-place, might give the third part of his tithes to that church (*Anglo-Saxon Laws*, vol. ii. p. 263). So in the laws of Ethelred, s. 17, it was ordained that tithes should be paid at specific periods; that is, to the church to which they of right belonged, *i.e.*, the church of the ecclesiastical district or parish. And so in a subsequent law of Ethelred, it was provided that a third part of the tithes should go to the reparation of the church, *i.e.*, the church to which it was payable—the church of the district or parish (*Anglo-Saxon Laws*, vol. i. p. 343). About the same period, mention is made in the Ecclesiastical Institutes of parishioners; that is a word used which is so translated in the Latin (*Anglo-Saxon Laws*, vol. ii. p. 423). Thus, therefore, it appears that parishes in the sense of ecclesiastical districts, with endowments of lands or houses set apart for the support of the clergy, had become adopted by the Saxons, and was protected by their laws. And not only so, but payment was enforced: of tithes, church-scot, and Rome-feoh,—Rome-fee, that is, Peter’s pence (*Laws of Ethelred and Canute*).

<sup>1</sup> The right of sanctuary is recognised in the Saxon laws from those of Alfred to the time of the Confessor. *Vide Anglo-Saxon Laws*, vol. i.

<sup>2</sup> This also it appeared was recognised in the time of Alfred, for the *Mirror* states that he caused a judge to be hanged who had condemned a clerk to death, whom he had no jurisdiction to try (*Mirror of Justice*, c. v. s. 1). So in the laws of Ethelred.

And not only were the immunities and privileges of the church fully recognised, but her powers : that is, her powers as derived either from her pastoral office and mission, or from her function of spiritual direction *in foro conscientiæ*. As regards the first, her freedom from secular corruption or state control was distinctly asserted.<sup>1</sup>

And as to the power of spiritual direction or correction, *in foro conscientiæ*, in the declaration of spiritual sentences for spiritual offences—in other words, the administration of canon or ecclesiastical law—the Saxon law abundantly and emphatically recognised it; and not only so, but to a great extent enforced it by temporal penalties, as a secular correction for spiritual purposes.<sup>2</sup>

Thus it will be seen that the position, the privileges, and the powers of the church were fully secured and protected by the Saxon laws; and that, therefore, her prelates were possessed of the most powerful influence. And when it is borne in mind that they were in close connection with Rome, and that the great fathers of the church had written in terms of the highest eulogy of the Roman law, it would be likely that the influence should be exerted in favour of a recurrence to Roman laws and institutions.

This, indeed, is what, according to the opinion of the most eminent historians, actually took place. Guizot repeatedly refers to the influence of the prelates upon the barbarians as an important

If a priest become a homicide, or otherwise flagrantly commit crime, let him forfeit his order and country, and be an exile as far as the pope may prescribe to him, and do penance. If a priest commit perjury or theft, let him be cast out of his order, and unless he make amends as the bishop may direct; and if he desire to clear himself, let it be, &c. (c. 26). These laws are re-enacted by Canute (c. 4). If a man in holy orders commit a crime worthy of death, let him be seized and held to the bishop's doom as the deed may be.

<sup>1</sup> Thus in the laws of Ethelred, "Let no man henceforth reduce a church to servitude, nor unlawfully make church-mongering; nor turn out a church minister without the bishop's counsel" (*Ethelred*, vi. c. 15). \* That is, the privilege of patronage was not to be pressed so as to assert in effect a power of control over the pastorship, nor was a cleric to be either appointed or ejected without the bishop's consent.

<sup>2</sup> As already mentioned, the laws enforced the payment of church dues and tithes and Peter's pence; they also enforced the observance of fast Sundays and festivals or fasts (*Laws of Canute*, 45). So the bishop was invited to attend the county court, for the express purpose of declaring the law of God—by which was meant the law of the church, the canon or ecclesiastical law. The laws of Ethelred speak of pecuniary penalties for spiritual offences, to be applied according to the direction of the bishops, as a secular correction for divine purposes (c. 51). So the laws of Edward the Confessor collected by the Conqueror speak of enforcement by the law of episcopal sentences in case of ecclesiastical offences. The laws of the Conqueror declared that the bishops should administer ecclesiastical law.

agent in civilisation. The same view was taken by our own philosophical historian, Mackintosh. He says: "The only institution of the civilised Romans which was transmitted almost entire into the hands of the barbarians, was the Christian church. The bishops succeeded to much of the local power of the Roman magistrates; the inferior clergy became the teachers of their conquerors, and were the only men of knowledge diffused throughout Europe; the episcopal authority afforded a model of legal power and regular jurisdiction, which must have seemed a prodigy of wisdom to the disorderly victors. The synods and councils formed by the clergy afforded the first pattern of elective and representative assemblies, which were adopted by the independent genius of the Germanic race. The ecclesiastics alone had any acquaintance with business; they only could conduct affairs with regularity and quiet. They were the sole interpreters and ministers of whatever laws were suffered to act, or felt to exist. To these powerful means of influence must be added the inexhaustible credulity of the superstitious barbarians, disposed to yield a far more blind deference than the conquering Romans had ever paid to their priests. . . . All the other institutions of the empire were worn out. Christianity, however, attired in its doctrines, was still a youthful and vigorous establishment, and the power which it speedily exercised in blending the two races, by gradually softening the ferocious courage of the Germans so as to make it capable of union with the reviving spirit of the Roman provincials, afforded an early instance of its efficacy in promoting civilisation" (*Hist. Eng.*, vol. i. p. 44).

The Saxon chronicles and Saxon laws afford ample authority for the view conveyed in the above passages. The chronicles show that the kings could not read or write, and had to attest their charters by their marks; and the preambles to all the laws show that the bishops were consulted in framing them: and, as our historian goes on to add, "this influence, on the whole, was exerted for the benefit of civilisation, and had a natural tendency to the institutions and laws of Rome." Hence all through the Saxon laws may be observed traces of this influence, and proofs of a gradual approximation to the laws and institutions of Rome, although these were no doubt influenced by the spirit of the barbarians, which was one of popular liberty and equality, having its manifestation in popular assemblies. Thus it was in the union of this influence of the Saxon spirit with the principles of the Roman system, that we derived

our whole system of judicature and jurisprudence, and especially trial by jury.

The Saxon laws not only allowed, but invited the attendance of the bishops in the courts of the county, to assist in the administration of justice;<sup>1</sup> and it need hardly be said that in those times the bishops were the only persons who had any notion of law. The canon law, or ecclesiastical law, founded upon the civil law, and, indeed, being the application of that law to ecclesiastical purposes, provided them with a system of law, and instructed them in the administration of justice; and they would naturally use their influence to the utmost in favour of an intelligent system of trial, and against barbarous usages.

The canon law required a trial by witnesses, and the civil law was, as we have seen, singularly strict in its requisites of proof in criminal cases. It may be imagined how intelligent ecclesiastics would revolt from the trial of men for their lives by clamorous assemblies, without the sanction of an oath, the testimony of sworn witnesses, or any of the safeguards of a judicial trial; and how still more they must have shrunk from the barbarous absurdity of the ordeal. Hence by degrees the practice was introduced of *swearing* those of the freeholders who were of the neighbourhood, and would be most likely to know the truth, to testify of it to the rest; and the ordeal was only resorted to when trial by witnesses failed, or was not possible. And thus it is that trial by jury, in the sense of trial by witnesses, became, in criminal cases, established, whenever it was possible, *i.e.*, whenever there were witnesses; which explains why, even up to the time of the Conquest, and afterwards, the ordeal was still at times resorted to.<sup>2</sup>

<sup>1</sup> Thus in the laws of Canute: "Let there be twice a year a shire-mote, and let there be present the bishop of the shire and the alderman, and there let them expound the law of God and the secular law;" the "law of God" meaning the law of the church, the canon or ecclesiastical law. So in the laws of Henry I., it is said that the bishops ought to attend the county courts. The canon law was adverse to such barbarous usages as the ordeal; and there is a passage in the *Mirror* which shows that the church had used all her influence against it; but it is astonishing how tenacious barbarian races are of their ancient usages, and the Saxons clung to the ordeal until the reign of John. The canon law required trial by witnesses.

<sup>2</sup> In Alfred's reign, as stated in the *Mirror of Justice* (a work based upon an earlier one written in his time), several judges were executed for causing prisoners to be hanged, either without a trial by twelve *sworn* men, or where the jury were not unanimous, or where they were in doubt (*Mirror of Justice*, c. 5). The germ of the system is to be seen in the Laws of Ethelbert; but there is no trace of it earlier, and all writers are agreed that at all events the Saxons had not trial by jury when they first came to this country, so that they must have adopted it here.

Thus, also, there were endeavours made to introduce trial by witnesses, whenever it was possible, in civil cases, and with that view there are a series of provisions in the Saxon laws to secure witnesses of transactions who might afterwards give testimony as jurors. For jurors, it will be observed, in that age, and until long afterwards, were sworn witnesses, upon whose testimony, of their own knowledge, the body of men who acted as judges determined. Trial by jury in the modern sense of the phrase, as a trial by jurors upon evidence, was yet far distant, and was only to be the result of gradual development.<sup>1</sup>

The administration of criminal law had undoubtedly become more advanced and developed among the Saxons than the civil law, and this for the obvious reasons that criminal justice is of earlier necessity, and is more simple in its nature, than civil justice; and in criminal justice the Saxons had so far learned from the Roman system as to have an intelligent mode of trial by king's judges, and "jurors," or sworn judges, of the facts; and, as we find, from the only relics of this system,<sup>2</sup> they had so far advanced as to have acquired the advantage of judicial decisions and settled precedents.

<sup>1</sup> Thus, in the laws of Edgar it is provided, that in every borh (*i.e.*, borough) and hundred a certain number of men, in each hundred twelve, were to be appointed as witnesses, who were to be sworn to give true testimony, and some of whom were to witness every transaction, that they might be afterwards called to give testimony in any civil or criminal proceeding arising out of the transaction (*Edgar*, iv. 5, 6). There are similar provisions in later Saxon laws.

<sup>2</sup> In the *Mirror of Justice*, which, though in its present form as recent as the reign of Edward I., incorporates an earlier work of the age of Alfred, and gives several judicial decisions of that time which are unmistakably Saxon, all the names being Saxon, and all the names of the judges after the Conquest being known through the learned labours of Mr Foss. Thus, under the head of Mayhem (a copious head of law under the Saxons, as we see from their laws), we read, "And Turgis saith, that the loss of the fore-teeth is Mayhem. And Sennall said, that the loss of the eyes is Mayhem;" in which the difference of tense will be observed, and it is implied that Turgis was still living when this passage was written. "And Billing saith," &c., as to which the same remark applies; and it is to be added that Billing appears among the names of judges hanged by order of Alfred, as stated in a subsequent chapter (*Mirror of Justice*, c. i. s. 9). So again (s. 10), "And Burmond enacted that all goods of those who fled should be awarded to the king. And Iselgram said," &c. Here the names are clearly Saxon, and Burmond also appears among the names of judges hanged by order of Alfred. So, again (c. ii. s. 26), it is said that "Hailif gave a notable judgment," which must have been in Saxon times, for the name is Saxon, and there is no mention of any such judge after the Conquest. So, in s. 12, it is expressly stated that there was such a course taken in a case mentioned, "in the time of king Edmund." There are also forms of indictments given, one of which is stated to have been used in the case just mentioned, and in all of which the names are pure Saxon.



But these judicial decisions, although of the greatest interest, as the earliest extant, yet are, as might be expected, extremely rude and rudimentary; and the records yet remaining of contemporary history show<sup>1</sup> that, though there was trial by jury and judicial authority, both parts of the judicial system were in the rudest possible state, as might be supposed when a new system, borrowed from a highly civilised law like the Roman, was engrafted on the usages of a rude and barbarous race like the Saxon. And it must be manifest that, while the Saxon institutions remained in their primitive form, there could be no regular judicature, and therefore no regular law.

The Anglo-Saxon system, indeed, had advanced thus far, that judicial decisions were of value as precedents, and as having a kind of quasi-legislative authority, at all events as declaratory or explanatory of the law, and they seem even to have gone a step further, and to have given to such decisions the effect almost of legislative ordinances.<sup>2</sup> But this would be comparatively of little importance so long as there were only numerous inferior local judges, without the control of a regular superior judicature.

<sup>1</sup> Thus, in the *Mirror of Justice* it is stated, that Alfred caused forty-four justices in one year to be hanged as murderers for their false judgments. The instances are all given, and some of them well illustrate the system, and confirm the above observations upon it. "He hanged Cordwine, because that he judged Hackwy to death without the consent of all the jurors. He hanged Markes, because he judged During to death by twelve men who were not sworn. He hanged Billing, because he judged Leston to death by fraud, in this manner: he said to the people, 'Sit ye all here but he who assisted to kill the man,' and because that Leston did not sit with the others, he commanded him to be hanged, and said that he did assist, whereas he knew that he did not. He hanged Thurston, because he judged Thuringer to death by a verdict of inquest without issue joined. He hanged Athelsan, because he judged Herbert to death for an offence not mortal. He hanged Rombold, because he judged Lischild to death in a case not notorious, and without indictment. He hanged Friburne, because he judged Harpen to die, whereas the jury were in doubt in their verdict, for in doubtful cases we ought to save rather than condemn. He hanged Wolmer, because he judged Graunt to death by colour of a larceny of a thing he had received by bailment. He hanged Therberne, because he judged Oscot to death for a fault whereof he was acquitted before. He hanged Oskitell, because he judged Catlin to death by the record of the coroner, without trial of the truth." And it is stated that Alfred hanged all the judges who had falsely saved a man guilty of death, or had falsely hanged any man against law or any reasonable exception. The number of these justices shows that they might only have been sheriffs or local judges, and it is to be borne in mind that in criminal cases the trial must be local, and the sheriff was the criminal judge in the county.

<sup>2</sup> There is a remarkable passage in the *Mirror*, in which it is stated that Thurmond ordained that criminal actions should cease at the year's end if not brought before, and the same time he appointed in all actions for things lost, and in personal actions he appointed the term after the last eyre (i.e., seven years), and in real

The study of those portions of the *Mirror*, which are plainly, from their internal evidence, Saxon, undoubtedly shows a far greater progress and development in law than could be gathered from the perusal of the written laws of the Saxons, and affords a remarkable illustration of the fallacy of looking to the written laws alone as evidence of the state of their law. The truth is, that the written laws only represented part of their law, and that part the worst. It represented most of what was of their own growth and introduction, and therefore was barbarian. It did not represent much that was infinitely more valuable, which was unwritten, and had been handed down by tradition, or was embodied in institutions. The written laws, for example, represent the usages of compurgators and the ordeal, but scarcely give a glimpse of trial by jurors or witnesses, and a whole system of criminal procedure, to be gathered from the *Mirror*.<sup>1</sup>

There are allusions to incidents of the manorial system, as the state of villenage, but only allusions, and not even allusions to the municipal system, with all its valuable privileges. It is from another source we must obtain information as to those portions of the law which were most valuable to the people, and were unwritten and embodied in customs or traditions or institutions; and this will explain much that is otherwise inexplicable in our history.

It can be shown from other sources, and has been partly shown already, that the most valuable rights of the people were embodied in *customs*, which were unwritten. It can be shown, for instance, that the bulk of the people held their lands entirely by custom.<sup>2</sup>

actions forty years (c. ii. s. 23). Now, Thurmond was clearly neither a Saxon nor a Norman king, neither was he a judge after the Conquest, for the names of the judges since then are known. He was therefore some Saxon judge or sheriff, and, as a baronial judge, he must have been a judge of the county, either as sheriff or by special commission for the county. But he evidently assumed a power to ordain. There is a similar passage as to one Lenfred, who, it is said, ordained the "wager of law" as to contracts, but this may have been only a judicial application of the system of compurgators: out of which wager of law certainly arose.

<sup>1</sup> A system of presentment by grand jurors, of indictment upon their oaths, and of trial by juries.

<sup>2</sup> There is a passage in the *Mirror* which states that when the "first conquerors" distributed the lands, they enfeoffed the earls of earldoms, the barons of baronies, the knights of knights-fees, villeins of villenages, and burgesses of boroughs (no mention being made, it will be observed, of common freeholders), whereof, it is added, some received their lands to hold by villein customs, as to plough their lord's lands, to reap,

It was difficult in that age to collect and embody unwritten law, insomuch that when after the Conquest it was attempted to put the Saxon laws into writing,<sup>1</sup> the first collection contained so little worthy of regard, that historians have been disposed either to dispute their authenticity, or to wonder at the importance which appears to have been attached to them by the body of the people. But afterwards, when, probably after further inquiry, another collection of laws was framed,<sup>2</sup> containing more of the *unwritten* customs of the country, it was easy to see their value and importance, seeing that they contained recognitions of the customs as to the villeins or cultivators of the soil, in entire accordance with the Roman law, and sometimes almost to the exact effect of imperial edicts on the subject, assuring the possession of their lands on condition of rendering their services; and also contained recognitions of those free popular tribunals or assemblies, on which perhaps the people most relied for the maintenance of these customs.<sup>3</sup> And it is to be observed that in the recognition by the Conqueror of the Saxon's "laws," allusion is expressly made to

cut, and carry his hay or corn; and although the people have no charters, deeds, or muniments of their lands, yet if they were ejected or put out of their possessions wrongfully, they might be restored, because they knew the certainty of their services." And then it is stated that St Edward, in his time, caused inquiry to be made of all such who held and did to him such services; and afterwards (*i.e.*, after the Conquest), many of these villeins, by wrongful distresses, were forced to do their lords services, to bring them into servitude again (*Mirror*, c. 2, s. 28), which is confirmed by a passage in Bracton, "Fuerunt etiam in conquestu liberi homines qui libere tenuerunt tenementa sua per libera servitia vel per liberas consuetudines, et cum per potentiores ejecti essent, postmodum reversi recoperunt eadem tenementa sua tenenda in villenagio faciendam inde opera servitia sed certa," &c. (lib. i. c. 11, fol. 7).

<sup>1</sup> The collection of the laws of the Confessor, made by order of the Conqueror.

<sup>2</sup> The laws of the Conqueror—those first passed by him in affirmance of the Confessor's customs and laws.

<sup>3</sup> "Isti sunt leges et consuetudines quas Willielmus Rex post adquisicionem Angliæ omni populo Anglorum concessit tenendas, eadem videlicet quas predecessor suus Edwardus rex, servavit in Anglorum regno." This was not entirely true, but to a great extent it was; at all events, as to the rights of the rural tenants, the villani, "Coloni et terrarum exercitores, non vexentur ultra debitum et statutum, nec liceat dominis removere colonos a terris dummodo debita servitia persolvant" (c. 29). This will be found in exact accordance, on the one hand, with the Rectitudines personarum of the Saxon times, "Villani rectum est varium, secundum quod in terra statutum est; and, on the other hand, is also in exact accordance with the imperial edicts on the subject. So, again, "Nativi non recedant a terris suis, nec querant ingenium unde dominum suum debito servitio sui defraudent" (c. xxx.) "Si domini terrarum non procurent idoneos cultores ad terras suas colendas justiciarii hoc faciant" (c. xxxii.) These laws, again, are entirely in accordance with the Roman edicts on the subject.

others<sup>1</sup> not recorded, and which were doubtless unwritten laws or customs, relating to the customary rights of the people, chiefly as to the tenure of lands and their popular assemblies or tribunals; in other words, relating to the municipal and manorial systems, and the popular tribunals, or assemblies of the people.

And in the laws of the Conqueror<sup>2</sup> it is to be observed that beyond the general recognition of former customs, there is an express mention made of the popular tenure of land, as villenage (which had then acquired the character of customary right), and also of the popular tribunals. And so, from the time of the Conquest to the time of Magna Charta,<sup>3</sup> there were repeated confirmations of

<sup>1</sup> The report of the Royal Commission of Enquiry into the Anglo-Saxon Laws already alluded to, has these statements added to it: "*Quam cum ipse Willielmus rex (i.e., the Conqueror) audivit, et alias leges de regno, maxime appreciatus est eam, et voluit ut ipsa observaretur per totum regnum; quia dicebat quod antecessores sui et omnium de Normanni de Norweia venerunt, et legem eorum cum honesta erat, bene deferent sequi cum profundior et honestior, sit omnibus aliis, sicut Britonum et Anglorum. Sed omnes compatrioti qui leges narraverunt summopere precati sunt cum ut permitteret eis leges et consuetudines habere cum quibus vixerant antecessores eorum et ipsi nati sunt, quia durum erat eis suscipere leges et judicare de eis quas nesciebant. Tandem concilio et precatu baronum adquivit et sic auctoritati sunt leges Regis (Anglo-Saxon Laws and Institutes, v. 1).*"

<sup>2</sup> In these laws many of the Saxon laws or institutions are recognised—indeed, all that relate to the rural or civil system of the country as apart from the military. The functions of the "hundredors," for instance (s. 5). So the system of local trials, the original of trials by jury: "*Si voluerit quis convencionem terræ tenendæ adversus dominum suum disracione per pares suos de eodem tenemento, quos in testimonium vocaverit, disracionabit, quia per extraneos id facere non poterit*" (s. 23). "*Nemo querelam ad regem deferat nisi ei jus defecerit in hundredo vel comitatu*" (s. 43). Then in a charter—the original of Magna Charta: "*Volumus etiam ac concedimus ut omnes liberi homines habeant et teneant terras suas et possessiones suas bene et in pace libere ab omni exactione injusta, et ab omni tallagio, ita quod nihil ab eis exigatur vel capiatur nisi servitium suum liberam, quod de jure nobis facere debent et facere tenentur et prout statutum est eis, et illis a nobis datum et concessum jure hereditario in perpetuum*" (s. 5; *Anglo-Saxon Laws*, vol. i. p. 491). The principle of this would extend even to the villeins, and was, indeed, applied to them in one of the laws of the Conqueror, embodying the whole principle of the Roman law upon the subject: "*Coloni et terrarum exercitores non vexentur ultra debitum et statutum: ne licet dominis remove colonos a terris dummodo debita servitia persolvant*" (s. 29). And again: "*Si domini terrarum non procurent idoneos cultores ad terras suas colendas, justiciarii hoc faciant.*" So as to boroughs, there was this important recognition of their privileges: "*Si servi permanserunt sine calumnia per annum et diem in civitatibus nostris vel in burgo a diè illa liberi efficiantur et liberi a jugo servitutis suæ sunt in perpetuum*" (s. 16; *A.-S. L.*, p. 494). And there was a general re-enactment of the laws of Edward, with the addition of those enacted by the Conqueror (s. 13, p. 473).

<sup>3</sup> The charter of the Conqueror has already been cited in which it was declared, "*Hoc quoque præcipimus ut omnes habeant et teneant, leges Edwardi*

the laws and *customs* which prevailed previous to the Conquest, except so far as altered by positive enactments ; that is to say, the municipal and manorial systems, neither of them being inconsistent with the feudal, and both of which were, as has been seen, of Roman origin, were preserved, with the rights and customs appertaining thereto ; and, on the other hand, as guarantees of popular rights and customs, the ancient popular tribunals, or rather assemblies, of the county and the hundred, were also preserved.

Beyond these, indeed, there was really little to preserve that was worthy of the name of laws, except such scraps and fragments of Roman law as had got into the *written* Saxon laws ; and as to these, it is to be observed, the people showed no anxiety. It was their customary laws and rights for the preservation of which they were anxious, and of which the explanation has been given. But *customs*, although valuable as sources of grounds of rights, or the origin of institutions, afford of themselves no adequate source of a system of law or a source of jurisprudence. There is, indeed, often an antagonism between custom, and reason, which is the only true basis of *law* ; for customs, having their origin in rude and primitive times, may by no means have been founded upon reason, and therefore can afford no sure basis for law. This was illustrated in the county courts, the popular tribunals of the Saxons, which, rude, turbulent, and tumultuous, were wholly unsuited for law or justice. These institutions might have sufficed for the rude times in which they were established, but as wealth increased, and interests became more complicated, there arose a necessity for a regular system of law and jurisprudence, which require to be developed from principles, and derived from some certain standard. Such a source of law and jurisprudence was to be found in the Roman law, and there alone ; but a system of law could only be

*regis in omnibus rebus adauctis, hiis quas constituimus ad utilitatem anglorum* " (*Ang.-Sax. Laws*, v. 1, p. 493). So there was a charter of Henry I. in which are these words, "*Lugam (legem) Edwardi regis vobis reddo cum illis emendationibus quibus eam emendavit pater meus consilio baronum suorum*" (*Ibid.* p. 51) ; and there are references to specific clauses in the collection of the laws of the Confessor, already alluded to, and hastily discarded, by Spelman, Hume, and Reeves, as "*spurious*." This charter formed the basis of the subsequent charters, which all contain confirmations of the ancient laws and customs of the country. There was also a charter of Henry I. to the city of London, in like manner the basis of all subsequent charters of the civic liberties of that and other ancient cities, whose privileges, it has been seen, were of Roman origin.

deduced therefrom by judicial decisions, which required a regular judicature, learned judges, and legal tribunals.

And the difficulty was to attain this object consistently with the maintenance of those great local popular tribunals to which the people clung so closely, as the guarantees of those customs on which their dearer rights depended. And it is most interesting and instructive—perhaps one of the most interesting points in the whole history of our law—to observe how the difficulty was surmounted, and the object attained; and, above all, to observe how easily it was done, with how little of apparent change, with what an utter absence of any violent or sudden change, and by what a happy adaptation of the existing institutions to the recognised exigency of the age.

The institutions of this country, as they arose by usage and prescription, were adapted to the wants and usages of the time in which they arose; on the other hand, became in course of time, as circumstances changed, obsolete; and other institutions grew up, in like manner, to meet the circumstances and exigencies of a subsequent age.<sup>1</sup> This was eminently the case with the popular tribunals of the Saxons.

<sup>1</sup> Thus, the court leet, which, as was said in the *Year-Book*, is the most ancient court of the realm (7 *Hen. V.* 12), was restricted, by the very prescription which created it, to matters of common nuisance and the like, and had no cognisance of other offences (*Year-Book*, 4 Ed. IV. c. 31; 8 Ed. IV. 15, 27; assize 6, 22 Ed. IV. 22). And a particular or private wrong could not be inquired of there, as an assault (*Martin, J.*, 4 *Hen. VI.* 10). It is governed by usage and prescription in all its proceedings (2 *Inst.* 72–163). Hence, when new matters arose, as the tanning of leather, or the like, it was held to have no jurisdiction (*Brooke's Abr. tit. Jurisdiction*). And even as to the sale of bread, as to which it had jurisdiction, it was held that it had not jurisdiction in cases arising under a modern statute fixing the weight of a loaf, without reference to price, because that was not strictly an assize of bread, and the jurisdiction of the leet was by prescription restricted to that; and Lord Mansfield said "These courts were very properly adapted to the customs and manners of a people upon their first settlement; but, like all other human jurisdictions, vary in the course and progress of time, as the government and manners of a people take a different turn, and fall under different circumstances. From the time of Magna Charta, the local jurisdictions had been gradually abridged, never enlarged. Experience shows the wisdom of widening, instead of contracting, the circle of civil and criminal jurisdiction" (*Colebrook v. Elliot*, 3 Burrow's Rep., 1859). "Justice, in this kingdom, of which it has always been tender, is singularly adapted to the frame of the English government, and the disposition of the English nation; and such, as by long experience and use, is, as it were, incorporated into their very temperament, and became, in a manner, the complexion and constitution of the English commonwealth" (*Hales's Hist. Com. Law*, c. 3). Hence it is that the Parliament have always been jealous of the reformation of what has been at any time found defective in it and so to remove all such obstacles as might obstruct the free course of it, and sup

In those early times, the only notion the northern nations had of administration of justice, was in a kind of rough arbitration, or rude determination by a popular assembly,<sup>1</sup> which bore no resemblance to a judicial tribunal; and which, conscious of its incapacity to get at the truth, took refuge in such wretched expedients as the ordeal.

port the use of it as the best and truest rule of justice in all matters civil and criminal (*Ibid.*) Thus also Sir M. Hale says: "From the nature of laws themselves in general, which, being to be accommodated to the condition, exigencies, and conveniences of the people, for or by whom they are appointed, the administration of those exigencies and conveniences do insensibly grow upon the people, so many times there grows insensibly a variation of laws; but though those particular variations and accessions have happened in the laws, yet they, being only partial and successive, are the same laws," &c. (*Ibid.* c. 4).

<sup>1</sup> "The various expedients which were employed in order to introduce a more regular, equal, and vigorous administration of justice, contributed greatly towards the improvement of society. What were the particular modes of dispensing justice in their several countries, among the various barbarous nations which overran the Roman empire, and took possession of its different provinces, cannot now be determined with certainty. We may conclude from the form of government established among them, as well as from their ideas concerning the nature of society, that the authority of the magistrate was extremely limited, and the independence of individuals proportionately great. The magistrate could hardly be said to hold the sword of justice: it was left in the hands of private persons. Resentment was almost the sole motive for prosecuting crimes, and, to gratify that passion, was considered as the chief end of punishing them. He who suffered the wrong was the only person who had the right to pursue the aggressor, and to exact or to remit punishment. From a system of judicial procedure so crude and defective that it seems to be scarcely compatible with the subsistence of civil society, disorder and anarchy naturally flowed. To provide remedies for these evils so as to give a more regular course to justice, was during several centuries one great object of political wisdom" (*Robertson's Hist. Charles V., Prelim. Dissert. State of Europe*, s. 5). "The greater part of affairs in common life or business was carried on by verbal contracts or promises. This, in many civil questions, not only made it difficult to bring proof sufficient to establish any claim, but encouraged falsehood and fraud by rendering them extremely easy. Even in criminal cases where a particular fact must be ascertained, or an accusation must be disproved, the nature and effect of legal evidence were little understood by barbarous nations. To define with accuracy that species of evidence which a court had reason to expect, to determine when it ought to insist on positive proof, and when it should be satisfied with a proof from circumstances, to compare the testimony of discordant witnesses, and to fix the degree of credit due to each, were discussions too intricate and subtle for the jurisprudence of ignorant ages. In order to avoid encumbering themselves with these, a more simple form of procedure was introduced into courts, as well civil as criminal. In all cases where the notoriety of the fact did not furnish the clearest and most direct evidences, the person accused, or he against whom the action was brought, was called or offered to purge himself by oath. . . This, however, proved a feeble remedy . . and the sentences of courts . . became so flagrantly iniquitous as to excite universal indignation against this method of procedure. Sensible of these defects, but strangers to the manner of correcting them, our ancestors appealed to heaven, and adopted the ordeal," &c. (*Robertson's Hist. Charles V., Prelim. Dissert.* s. v.) This is very accurate, and applicable.

Such an assembly was the Saxon county court; and, originally, the only court of general and ordinary jurisdiction was the county court.<sup>1</sup> Before the Conquest, it was the only such court: at the Conquest, the court continued to exist with its ancient jurisdiction, and was even called the court of the king, there being still for some time no other court of general and ordinary jurisdiction; though it was not long before its defects were discovered, and measures were taken to modify and improve it.

And, at that time, the only remedy which the suitor could require from the king,<sup>2</sup> was a writ to compel the sheriff to hear and determine the cause in the county court.<sup>3</sup> Nor even to that extent, until an attempt had been made to get the cause so heard in that court. Indeed, the people were at that time obstinately attached to their ancient popular tribunals; and even the power of the Conqueror could not anticipate the effects of experience, or venture at once to alter or abolish them.

The county court, originally, was simply an assembly of the people of the county,<sup>4</sup> who, from necessity, formed a kind of natural tribunal, composed of neighbours, who, by a kind of mutual arbitration, settled disputes among themselves, rather by discussion,

<sup>1</sup> All through the Saxon laws, it is so spoken of, and there is no trace of any court of superior jurisdiction. Even after the Conquest—though steps were taken to improve it by sending down the king's justiciary to preside over it—still it continued with its ancient jurisdiction; and in the laws of Henry I., it is called the *curia regis* (*Leyes Hen. Prim.* c. 31), in which the bishops and barons of the county sat, and which had jurisdiction, without any limitation, over all causes arising within the county, with power to cite or summon defendants, or parties sued, even though residing in other counties (*Leyes Hen. Prim.* c. 41).

<sup>2</sup> Thus in the laws of the Conqueror, c. 43:—"Nemo querelam ad regem deferat, nisi ei jus defecerit in hundredo vel in comitatu." This was one of the laws he passed at the instance of the people as one of their ancient laws: "Isti sunt leges et consuetudines quas Willielmus rex omni populo Anglorum concessit tenendas eidem, videlicet, quas predecessor suus observavit." The previous Saxon laws contained similar enactments; and there can be no doubt that the people were obstinately attached to their old popular tribunals until experience had shown their mischievous character.

<sup>3</sup> Thus, in the *Mirror*, it is said, indeed, that a man might have a remedial writ to the sheriff in this form: "Questus est nobis, quod, &c. Et ideo tibi (vices nostras in hac parte committentes), præcipimus, quod causam illam audias et legitimo modo decidas" (c. 182).

<sup>4</sup> This, indeed, is the language used by the *Mirror* in one of the earlier and more ancient chapters, in which it treats of superior courts. It says, from the first assemblies came consistories, which we now call courts, and these courts are called county courts, where the judgment is by the suitors, if there be no writ, and it is by ordinary jurisdiction (c. i. s. 15). Hence in the Saxon laws the county court is called *folcmote*, or meeting of the people. Even in the reign of Henry I., it is called *shire-*



or perhaps acclamation, than with any forms of regular justice, or the rules of a legal tribunal.

There can be no doubt that the ancient county court jurisdiction, in so far as it was not one of mere rough arbitration by neighbours, mainly regulated by what came to very much the same thing—viz., the local customs of the counties,<sup>1</sup> which, from various causes, varied greatly, and the observance of which, of course, as the only rule of law (though under certain limits it may be useful) must be fatal to anything like that uniformity of law to obtain which is one of the great objects of an intelligent system of justice.

It will be manifest, on a moment's reflection, that where the laws are, with the exception of mere rude usages or rudimentary institutions, unwritten—a system of law can only be developed by judicial decisions of men learned in some system of law.<sup>2</sup> And as there was then no system of law extant, but the wondrous comprehensive system of the Roman law, in itself all-sufficient—and there was that—it would follow that the object could only be attained by placing the administration of justice virtually in the

mote (*Leg. Hen. Prim.* s. 8). Hence the suitors, i.e., the freeholders, were—so long as the ancient jurisdiction was exercised—the judges of the court. This, it is obvious, was practically an assembly of the people; and, naturally, in such a simple tribunal, the opinion and testimony of the near neighbours of the parties, the inhabitants of the same hundred or vill, would be sought, so that, virtually, the trial was by the neighbours.

<sup>1</sup> The county in those days was put for the country. It was always well understood that it was the custom of the county, not any particular place in it, which could be called the custom of the county, though any mere local custom might be called in the particular locality where it existed. Thus in the report of an ancient case, *temp.* Edward II. it is said—"Nota, en cas usage defait commune ley, que usage usée permy le pais defait commune ley, mes usage de un vill'ou de deux, ne defait commune ley: que un feme porta son breve de dower de la mort, &c., des tenements que furent a son baron, le que tient les tenements en soccage, et ne fut pas respond a cet demande, avant quel allega usage de tout le counte que femes furentdowables de les tenements que lour barons tiendrent en soccage per tout le counte" (*Year-Book*, 17 *Edw. II.*, 212). So "le custome et usage de Oxenford" (*Year-Book*, 21 *Edw. III.*, 46). "Le custome de Northamptonshire par le delivery d'un distresse en l'absence de'l bailey del francpledge" (30 *Edw. III.*, 23). So in Bracton mention is made of "the custom of Epswic" (Ipswich). So in Glanville it is said that the customs of the county courts varied in different counties as to criminal law (lib. xiv.), which may have been one reason why Magna Charta took away the jurisdiction criminal from the sheriffs.

<sup>2</sup> Guizot points out the necessity, for the reasons above-mentioned, of a judicial order; of a class of persons especially devoted to the administration of justice; and shows how justice could not be duly administered under the feudal system from the want of such an order, and also from the want of an independent body of judges of the facts. "The vassals," he says, "it was very difficult to collect, that they might judge. They came not, or when they did come, it was the suzerain who arbitrarily

hands of judges learned in that law, and who might, by the light of its principles, applied and modified as need might be, work out a system of law suited to English customs and English institutions. There was no difficulty in finding such an order of men for judges.

These were, as Mackintosh and Guizot have pointed out, the Roman ecclesiastics; and these had acquaintance with the Roman law.<sup>1</sup> The difficulty was how to get the administration of justice virtually under their control throughout the country.

They were members of a *curia regis*, the great court or council of the king; and as, in that age, they were the only persons who had any notion of law or jurisprudence, they were necessarily the chief members of that supreme tribunal, which, however, does not appear to have had any original or ordinary jurisdiction, and was rather a council than a court of justice: a council in which the sovereign sat to hear complaints of the administration of justice, in the exercise of his prerogative, the care of the justice of the realm.<sup>2</sup>

selected them. That great and beautiful system, the intervention of the country, therefore, necessarily fell into decline, from the most powerful of causes, *inapplicability*" (vol. ii. lec. 151). He shows how, as from these causes, the feudal principle of judgment by peers became impracticable, another judicial principle was then introduced—a class of men devoted to the function of judges. "Thus," he says, "commenced the modern judicial order, of which the great characteristic is the having made of the administration of justice a distinct profession; the special and exclusive task of a certain class of citizens." And another characteristic he points out was its central character; the royal superseding all local jurisdictions by establishing one sovereign and supreme (lec. 14).

<sup>1</sup> There had been an absurd tradition among English lawyers and historians, from the time of Blackstone, to the effect that the Roman law had perished, and that it was suddenly brought to light by the discovery of a copy of the Pandects at Amalfi in the middle of the twelfth century. As already shown, the whole course of the Saxon laws and Saxon history shows that the Roman law had never been lost sight of, and, as Mr Hallam observes—"That this body of laws was absolutely unknown in the West during any period, seems to have been too hastily supposed. Some of the more eminent ecclesiastics occasionally refer to it, and bear witness to the regard which the Roman Church had uniformly paid to its decisions" (*Europe in the Middle Ages*, c. viii.)

<sup>2</sup> Thus in the laws of the Conqueror there is mention made of the sheriff being convicted before the king's justiciary, which means the supreme judicial minister or officer of the kingdom, who exercised a supreme jurisdiction over the sheriffs. In the laws of the Confessor (c. xvii.), there is a provision that except in cases of special franchises, persons should do right before the justice of the king, in the hundred or the shire (s. 22). This was upon the principle that the sheriff was the justice of the king, as no doubt he was, although he sat in popular tribunals; and in the civil, if not the criminal sessions of the county court, the suitors or freeholders were the judges; yet he was the justice of the king in criminal cases, and, as already has been seen, even under the Saxon kings, it had become recognised that properly the freeholders ought to be made jurors—that is, be selected and sworn to decide justly. At all events, this was done in the time of Alfred.

And by those, as already seen, under the Saxon law, which had been solemnly recognised and established, the general justice of the realm, civil and criminal, was administered in the local popular tribunals of the county or the hundred, in which—in civil cases, at all events—the “suitors,” or freeholders, were the judges, although it had become recognised even in Saxon times that the sheriff was the king’s judge in criminal cases, and that it was proper to swear a select body of the suitors, and constitute a tribunal of sworn judges or jurors.<sup>1</sup>

From this an inference was drawn, which led to the first step in the course of improvement: that the crown could appoint a *special* justiciary to hold a county court. Accordingly, when the unfitness of the county court to determine matters of importance was observed, the course at first adopted to remedy the evil was<sup>2</sup> by sending down king’s justices into the counties to convene the counties, either being appointed sheriffs, or, under special commissions issued for the purpose, to preside at the trial of particular cases, a course necessarily taken when the sheriff was personally interested.

It would very soon occur to a judge, with any knowledge of what

<sup>1</sup> That juries were used in criminal cases in the time of Alfred is manifest from the *Mirror of Justice*, which states that he caused several justices to be hanged for false judgment, and one of them because he judged a man to death without the consent of all the jurors; and another “because he judged a man to death by twelve men who were not sworn;” and another “because he hanged a man to die whereas the jury were in doubt of their verdict; for in doubtful cases one ought rather to save than to condemn.” And he hanged the “suitors” of one place because they judged a man to death by jurors for a felony he did out of their liberty. It is clear that the justices and jurors in these cases are equally distinguished from the suitors, and that the justices were the sheriffs, and the jurors sworn suitors or freeholders.

<sup>2</sup> This was done soon after the Conquest, in a great case in the Kent county court between the Archbishop of Canterbury and Odo of Bayeux. A foreign prelate—“*qui in loco regis fuit vel justiciam habuit*,” and who was no doubt chosen as skilled in law—was sent down under a special commission, as king’s justiciary, to hold the county court (1 *Mad. Ex.* 32), and its turbulence was so obviously unsuited for justice, that he ordered twelve freeholders to be sworn and empanelled—the first trial by jury (*Dugdale’s Orig. Jurid.* 21). Other similar instances occurred even in the reign of the Conqueror. Sir J. Mackintosh took the view above suggested as to the origin of trial by jury, and its arising out of the county court. “Perhaps,” he says, “the first conception of it may have been suggested by the very simple expedient of referring a cause by the county court to a select body of their number, who were required to be twelve, for no reason that has been discovered. . . . In civil cases, the obvious analogy of arbitrators might have contributed to the adoption of jurors. . . . A case is preserved in the reign of William I. which has much the appearance of the dawn of trial by jury.” He cites it, and then observes, “Here we see a reference from the county court to twelve men. The trial by twelve (*i.e.*, twelve sworn men-jurors) became so much the usual course of proceeding, that it was now called the course and order of the common law” (*Hist. Eng.*, vol. i.)

was due to the administration of justice, to have a certain number of the freeholders sworn and empanelled to give their verdict. This made them jurors, and converted a turbulent county court into a judicial body of jurors, under the direction of a judge with some notion of law. And this mode of proceeding was often adopted, either by making skilled judges sheriffs,<sup>1</sup> or by sending them as justices into the counties, under special royal commissions, to try particular cases whenever there was found any excuse for so doing.

This, however, was only a remedy in particular cases, and under the Conqueror and his successors, until the middle of the reign of Henry I., the common justice of the realm was still administered in the county court and other local courts of an inferior order.<sup>2</sup> Indeed, at that time the county court was still called *curia regis*, and there is no trace of any other court—at all events, of primary or ordinary jurisdiction. And an attempt was made to improve the county court by compelling the barons to attend there.

The administration of the justice thus dispensed in numerous local courts<sup>3</sup> was in a state utterly unsatisfactory, which led of

<sup>1</sup> In those times the sheriff was always himself a potent person—perhaps a prelate or a peer—and he might have suits against others or against himself; and there might, for this and other reasons, be necessity for sending kings' justices, as in the case of the suit between the bishop of Rochester and the sheriff of Cambridgeshire, which was tried in the county court before the king's justiciary, who was a prelate, and who also, no doubt, had a sworn jury (*Dugdale's Orig. Jurid.* 21). But the king's justices were often made sheriffs. Numerous instances of this are given in the learned work of Mr Foss (*Lives of the Judges*, vol. i. p. 186, 189, 377). The same person was sometimes sheriff of several counties (*Ib.* p. 292), and held the office for years (345), and the chief justiciary was often made sheriff of several counties (264). The most remarkable instance of this was the illustrious Glanville, who had been for many years a justice and a sheriff, and was ultimately made chief justiciary (p. 130).

<sup>2</sup> Thus in the *Leges Henrici Primi*, the barons of the county (c. xxix.) are said to be the king's judges: "Regis iudices sunt barones comitatus qui liberas in eis terras habent," which (as Spelman says) clearly means the freeholders; and afterwards it is said that the bishops and counts, &c., ought to be in the county court, and that no one can dispute the record of the court of the king, which clearly means the county court mentioned just before. "Interesse comitatu debent episcopi comites, &c. Recordationem curiæ regis nulli negare potest. Unusquisque per pares suos iudicandus est et ejusdem provinciæ" (c. xxxi.) That is, by the fellow-suitors, the fellow-freeholders of the county. Afterwards it is said: "Si quis in curia placitum habeat convocet pares et vicinos suos; ut, inforciati iudicio, gratuitam, et cui contradicere non possit, justitiam exhibeat" (c. 33).

<sup>3</sup> "The administration of the common justice of the kingdom," says Hale, speaking of a period even later, "seems to have been wholly dispensed in the county courts, the hundred courts, and courts baron. This doubtless bred great inconvenience

necessity to great uncertainty, variety, and want of uniformity in the law.

uncertainty, and variety in the laws : First, by the ignorance of the judges who were the freeholders—and though the bishops, barons, and great men were, by the laws of Henry I., to attend the county courts—they seldom attended there, or if they did, in process of time they neglected the study of the English laws” (as if, at that time, there were any English laws to study !) “Secondly, another inconvenience was, that this bred great variety of laws, especially in the several counties ; for, the decision being made by divers courts and several independent judicatories, who had no common interest among them in their several judicatories, thereby, in process of time, every several county would have several laws, customs, rules, and forms of proceeding, which is always the effect of several independent judicatories administered by separate judges. Thirdly, all the business of any moment was carried by parties and factions, for, the freeholders being generally the judges, and, as it were, the chief judges, not only of the fact but of the law, every man that had a suit there sped as he could make parties ; and men of great power and interest in the county did easily overbear others in their own causes, or in such wherein they were interested, either by relation of kindred, tenure, service, dependence, or application” (*Hist. Com. Law*, c. 7). “The administration of justice in the county, and other inferior courts, notwithstanding some striking advantages, was certainly pregnant with great evils. The freeholders of the county, who were the judges, were seldom learned in the law. Again, the determinations of so many independent judges, presiding in the several inferior courts dispersed about the country, bred great variety in the laws, which in process of time would have habituated different counties to different rules and customs ; and the nation would have been governed by a variety of provincial laws. Besides these inherent defects, it was found that matters were there carried by party and passion. The freeholders, often previously acquainted with the subjects of controversy, or with the parties, became heated and interested in causes, which, added to the influence of great men, rendered these courts unfit for cool deliberation and impartial judgment. Besides, a judicial authority, exercised by subjects in their own names, must weaken the power of the prince, one of whose most valuable royalties, and that which most conciliates the confidence and good inclination of the people, is the power of providing that justice should be duly administered to every individual. Though the appeal from the hundred to the court of the sheriff was kept in check, it was to be wished that justice should be administered in the first instance by judges having their commission from the crown” (*Litt. Hen. II.*, vol. v. 273 ; *Reeve*, p. 53). So another great author points out how the necessity for regular judges would be gradually recognised. “Men, as soon as they were *acquainted* with fixed and general laws, perceived the *advantage* of them, and became impatient to ascertain the principles and forms by which judges should regulate their decisions. . . . These various improvements in the system of jurisprudence and the administration of justice occasioned a change in manners of great importance, and of extensive effect. This gave rise to a distinction of professions. . . . Among uncivilised nations there is but one profession honourable—that of arms. . . . Nor did the judicial character demand any degree of knowledge beyond that which untutored soldiers possessed. . . . But when the forms of legal proceedings were fixed, when the rules of decision were committed to writing, and collected into a body, law became a *science*, the knowledge of which required a regular course of study, together with long attention to the practice of courts. . . . Not only the judicial determination of points which were the subject of controversy, but the conduct of all legal business and transactions were committed to persons trained by previous study and application to the knowledge of law. The functions of civil life were attended to, the talents requisite for discharging them were cultivated” (*Robertson’s Hist. Charles V., Prel. Dissert.*) Thus this eminent author

For such a state of things it was necessary to find a remedy,<sup>1</sup> and as the attempt to find it in the attendance of persons of eminence at the county courts either proved inadequate, or failed probably from their indisposition to take part in proceedings so turbulent, or perhaps from the want of due regularity in the discharge of a duty which necessarily, in such a state of things, was vague and indefinite: it was therefore necessary, in order to apply a remedy, to apply some new system, and it could only be devised by men who had derived some knowledge of the principles of rational and civilised procedure. There was no source at that time whence that knowledge could be derived except the Roman law, and happily, at that time, the study of that law had revived, and was established in this country.<sup>2</sup> Its results were at once made manifest in a great improvement in our law.

regarded a regular procedure, and the cultivation of justice as a science, and the law as a profession, as great advances in civilisation, and a vast improvement in society. And this was so among our ancestors.

<sup>1</sup> The experience already had of a better mode of administering justice no doubt stimulated the desire for it, as Guizot observes. "Instead of a regular gradation of courts, all acknowledging the authority of the same general laws, and looking up to these as the guides of their decisions, there were in every feudal kingdom a number of independent tribunals, the proceedings of which were directed by local customs and contradictory forms. The collision of jurisdiction among these different courts often retarded the execution of justice. The variety and caprice of their various modes of procedure must have for ever kept the administration of it from attaining any degree of uniformity or perfection. But the usurpations were so firmly established that kings were obliged to rest satisfied with attempts to undermine them. . . . The attempt, nevertheless, was productive of good consequences. . . . It turned the attention of men towards a sovereign jurisdiction. . . . This facilitated the introduction of appeals, by which princes brought the decisions of the local courts under the review of the royal judges. . . . The sovereigns appointed the royal courts, which were originally ambulatory and irregular with respect to their times of meeting, to be held in a fixed place and at stated seasons. They were solicitous to appoint judges of distinguished abilities. . . . They laboured to render their forms regular and their decrees consistent. Such judicatories became, of course, the objects of public confidence. Thus kings became the dispensers of justice," &c. (*Robertson's Hist. Charles V., Introd. Diss.*, s. 5).

<sup>2</sup> It was in the reign of Stephen it was publicly taught at Oxford by Vacarius. From some cause, its study was prohibited by that king, but, says Selden, happily the prohibition failed. "Sed parum valuit Stephani prohibitio, nam eo magis invaluit virtus legis Deo favente qui eam amplius nitetur impietas subvertere" (*Dissert. ad Flet.*, c. vii. par. 6). That, however, was only on the occasion of its being taught to students at the university, and there might have been reasons for prohibiting it there on the ground of its diverting the students from other studies. There can be no doubt, however, that it had for some time previously been studied by the ecclesiastics, who, in that age, were the only persons possessed of any learning, for the treatise or compilation, called the Laws of Henry I., which was evidently written at the close of his reign, is in a great degree made up of civil and canon law.

The study of that law taught<sup>1</sup> the necessity for a more regular judicature, derived from an order of men devoted to the judicial duty, and qualified for its discharge by knowledge of legal principles; and it furnished ample stores of learning whence that knowledge could be acquired. And it suggested the attempt to

<sup>1</sup> That it had taught this to some eminent persons who were engaged in the administration of justice at that time, is manifest from the composition called the "Laws of Henry I." Lord Hale observes of it, that it has a taste of the civil law, but that is far beneath the truth. It is composed, perhaps, in equal portions of Roman law and Saxon law, and is an obvious endeavour to engraft the former upon the latter, or rather to unite a Roman system with Saxon institutions. As to the influence exercised at this important period by the Roman laws upon the formation of our own there can be no doubt; and it is attested by the most eminent of modern historians, who have fully exposed the absurd idea which first gained credence in the pages of Blackstone—that the study of the Roman law was quite a novelty in the twelfth century, and was at once expelled. Thus, Sir James Mackintosh, writing of the reign of Henry I., says, "It is essential to observe, at this step of our progress, that the Roman law never lost its authority in the countries which formed the western empire, and it was adopted into the codes of the Germanic conquerors. All Europe obeyed a great part of the Roman law, which had been incorporated with their own usages, when these last were first reduced to writing, after the Conquest. The Roman provincials retained it altogether as their hereditary rule. The only historical question regards not the obligation of the Roman law, but the period of its being taught and studied as a science. It is not likely that such a study could have been entirely omitted in Roman cities; and where there were probably many who claimed the exercise of the Roman law." The historian here, in a note, cites references from Savigny i. 16, of instances, from 800 to 1160, where the Roman law had been referred to as binding; and he cites, from the same author, instances of prelates who studied the Roman law, among others a Saxon bishop, who studied Roman law at York in the 7th century. "But the Roman jurisprudence did not become a general branch of study till after the foundation of universities. It had made its way to England, and was taught with applause by Vacarius at Oxford about the middle of the 12th century. The late researches of Savigny and other German jurists on the subject have merited the gratitude of Europe. It was, indeed (he adds), a most improbable supposition that a manuscript found at the sack of Amalfi, not adopted by public authority, should suddenly prevail over all other laws in the greater part of Europe." The treatise called *Leges Henrici Primi*, was the first attempt at anything like an intelligent system of procedure, and it lays down all its essential principles. It is, therefore, in these points of view, one of the most interesting documents of our legal history, and has been strangely disregarded. Hale alludes to it, and quotes it several times, and so does our author; but they evidently did not appreciate it in the point of view in which it is now presented, as a step or stage, so to speak, in the history of our law. Lord Hale, however, had evidently given more attention to it than our author, and remarks how much of it is devoted to procedure. That of itself was an immense advance; for, as Guizot observes, the study of procedure is the beginning of civilisation. "If," he says, "you find, in place of the oath of compurgators, or the judicial duel, the proof by witnesses, and a rational investigation of the question, there is the beginning of civilisation" (*Lectures upon Civilisation*). Now that is what we do find in the laws of Henry I. It is impossible not to perceive that the compilation contains the groundwork of a regular system of judicature and of jurisprudence. The laws bear

would the popular assemblies into something like regular tribunals, and to blend the Roman system with Saxon institutions.

The result was the institution, in the reign of Henry I.,<sup>1</sup> of itinerant judges, and internal evidence that they were composed by an ecclesiastic, and one who had been thoroughly acquainted with the laws in force; as there were few in that age who could have composed such an elaborate body of laws in Latin, and there was only one man of whom it can be deemed at all probable. That was the celebrated Roger, Bishop of Salisbury, described in the *Dialogus de Scaccario* as “vir prudens consiliis providus,” and of whom it is added, “maximis in regno fungebatur honoribus, et de Scaccario plurimum habuit scientiam.” This eminent man was in the highest judicial office during nearly the whole reign of Henry I., first as chancellor, and next as chief justiciary and chief baron of the exchequer; and it is remarkable that the provisions in the laws in question, as to the fiscal rights of the crown, were very acute, and show great knowledge of the subject. He died a few years after Henry, and had leisure during the close of his life to make such a compilation; and there was not a single man of his age but himself who could have done it. In the *Mirror of Justice*, a work in its present form written in the reign of Edward I., there are various laws mentioned as ordained by Henry I., and not to be found elsewhere than in this collection. Several chapters at the outset, evidently drawn from the civil and canon law, lay down the general principles on which administration of justice must rest; a judicial order of men; proper judicature and regular procedure, all directed to the due examination of the truth and justice of the case, “Judices in omni discussione probitatis idonei, nullaque exactione permixti.” “Causarum qualitas sincera persecutacione pensanda” (c. v.) “De causis singulorum justis examinationibus audiendis, de prepositi et meliorum hominum presentie” (c. vi.) It was laid down that it belonged to the king to look to failure of justice or unjust judgments, or perversion of the law. “Injustum judicium defectus justitie prevaricatio legis regie” (c. x.) “Defectus justitie et violenta recti eorum destitutio est qui causas protrahunt in jus regium” (c. xxxiii.) “Defectus justitie commune regis placitum est super omnes” (c. lix.); and that it is the duty of all to obey the summons of the king’s justice, “Qui secundum legem submonitus a justitie regis ad comitatum venire supersederit reus sit,” etc. (liii.) A great lawyer who was profoundly versed in the antiquities of the law of England, has well described the ascendancy which, at this era in the history of our law, the Roman law had gained; and showed how it was resorted to as a guide when there was neither special enactment nor local usage, or when it was desired to have recourse to that perfection of reason which is the solid basis of all law. “Ita jam, id est, sub annum 1145, receptus fuit juris Justinianæi usus, ut quoties interpretandi jura, sive vetera, sive nova, sive ratio, sive analogia desideraretur aut mos aut lex expressior non reperiretur, ad jus illud Justinianæum tum veluti rationis juridica promptuarium optimum ac ditissimum, tum ut quod legem in nondum definitus ex ratione seu analogia commode suppleret, esse recurrendum. Certe ita ferme Rhodiam recepere veteres Romani legem in rebus nauticis ut etiam apud nos, et gentes vicinas leges recepiuntur Oleronionæ; cum interim nec hæ nec illæ ex autoritate sui, quâ primo conditæ sunt, vim sic obtinuerint” (*Selden and Fleet*, c. vi. p. 4). So in his *History of Tithes*, c. vii., the same learned author puts its adoption on the ground of reason.

<sup>1</sup> From the 18 Henry I., the rolls in the exchequer show that the justices went, how long before then is not known, but it is probable that they had gone—though perhaps less regularly, or on special occasions—before then. Indeed it is, as already mentioned, an historical fact that they had gone as early as the reign of the Conqueror in special cases, and instances of it have been adduced. Hence Sir J. Mackintosh observes of the more regular institution of justices itinerant, that it probably



erant justices to proceed into the counties under the king's commission, and try such classes of cases, civil or criminal, as might be committed to them by their commissions. This was the first foundation of a regular judicature; of a judicial order of men devoted to the administration of justice. And in the result it worked a revolution in the law of the country.

It is beyond a doubt, whether the laws or the legal history of the age be looked at,<sup>1</sup> that as early as this reign—the first settled

only gave permanence to a practice which already existed. In these attempts were the beginnings of regular law and justice. Thus Guizot (*Hist. Civiliz.*, Lect. iii.), pointing out the beginning of civilisation among the people of Europe, says, "Look to the system of procedure, and you find in place of the oath of compurgators, or the judicial combat, the proof by witnesses, and a rational investigation of the matter in question. The law begins to bear a systematic and social character. There was a beginning of civilisation—an endeavour to bring men under general and regular principles." So Mr Mill (*Hist. Brit. India*), though rather an admirer of Hindoo and Mahometan systems as "simple and natural" (*i.e.*, rude), admits that they made no provision for uniformity (vol. i. p. 171), and that the Indian system of procedure is liable to the evil of arbitrary power (*Ibid.*, p. 641). He thinks that a regular system of procedure would not prevent this; but it is the object of the present treatise to show that it does. It is very observable that in the early laws of all countries there are few rules of procedure. The laws of Menu scarcely contain any; see Sir W. Jones' Works, vol. iii. So of the Saxon law. So of the Mahometan, as described by Mr Mill. "The first considerable step towards establishing an equal administration of justice was the abolishment of the right which individuals claimed of waging war with each other. . . . Not only questions concerning uncertain or contested facts, but general and abstract points of law, were determined by the issue of a combat. . . . Thus the form of trial by combat, like other abuses, spread gradually, and extended to all persons and almost to all cases. . . . By this barbarous custom, the natural course of proceeding, both in civil and criminal questions, was entirely prevented. Force usurped the place of equity in courts of judicature, and justice was banished from her proper temple. . . . The clergy from the beginning remonstrated against it as repugnant to Christianity and subversive of justice and order. . . . The spirit of courts of justice became averse to it, and it went more and more into disuse, though instances of it occur as late as the 16th century, in the histories both of France and England. In proportion as it declined, the regular administration of justice was restored; the proceedings of courts were directed by known laws; the study of them became an object of attention to judges; and the people of Europe advanced towards civilisation" (*Robertson's Hist. Charles V., Prel. Dissert.*, s. 4). So Hale says, that the "persuasions of the clergy," and the sense of its barbarousness, by degrees drove out the ordeal, so that, although it prevailed all through the reign of John, it was not to be met with in the reign of Henry III.; and, in like-manner, the "duel," or trial by battle, gradually died out.

<sup>1</sup> In the *Mirror of Justice* it is stated, as it is also stated in the laws of Henry I., above alluded to, that no one had authority without the king's writ to "send for the people; but the king's officers could do so (c. i. s. 13), whence it would follow that the king's justices could convene the men of the county, as they did in the "itineraries" or assizes, and the laws of Henry I. had a provision that men of the county who did not attend at their summons should be liable to a penalty. And it is also stated in the *Mirror of Justice* (c. xi. s. 4), that in the time of Henry I. it was

reign after the Conquest, and the first which afforded leisure for anything like a settlement of the judicature and administration of justice of the country—they were settled upon the basis of Saxon institutions, but on the principles of the Roman system; and so as to secure the advantages of a regular judicature with a local administration of justice; and unite trial by jury with settled law.

It is also beyond a doubt that, as necessary to trial by jury, which was thus, at this early period after the Conquest, established in civil cases, there was a procedure for the settlement of the issues to be tried.<sup>1</sup> This, which is essential to such trial in civil cases, where, from their nature, the questions in dispute, and issues to be determined, cannot be known beforehand, as in criminal cases, was also established, substantially, upon the Roman model.

The justices itinerant were sent down by the king's court or council<sup>2</sup> into the counties, chiefly and primarily to hear pleas of

ordained that *jurors sworn upon assizes* should not have fees. Hence it appears from this ancient law book that in this reign there were trials by jury at the assizes. The records of judicial history show the same thing. It is shown by Mr Foss (*Lives of the Judges*, vol. i.), that the itineraries of the judges into the counties commenced in this reign, and as they had learned, even under the Conqueror, to turn a county court into a jury, there could be no doubt they continued to do so. But the records of the exchequer show the "itineraries" from the 18 Henry I. Sir J. Mackintosh also observes of this period, "Henry II. divided England into six circuits, not very unlike the present distribution, each of which was to be visited by three itinerant justices, to bring the dispensation of laws home to every man's door" (*Hoveden*, 314). "This statute, however, like others, appears only to have given authority and universality to practices occasionally adopted before" (*Hist. Eng.* v. i.). Elsewhere also that acute historian observes upon the slow and gradual character of the changes in our laws (*Ibid.*).

<sup>1</sup> The above cited passage plainly proves that trial by jury in civil cases was established in the reign of Henry I., and a subsequent passage in the *Mirror*, coupled with passages in the "Laws of Henry I.," already noticed, as to "exceptions," answers, &c., shows that a system of pleading, in order to settle the issues, must have been established about the same time; and, indeed, without some such system, trial by jury in civil cases would be impossible. The effect of the passage here referred to in the *Mirror* (c. ii. s. 23), is that, as there were great delays in the examinations, and exceptions in an assize, Glanville had ordained an assize by a quicker process; to be tried by twelve jurors of the next neighbours. This shows what, indeed, would be manifest, *a priori*—that there had before his time been some system of pleading anterior to trial.

<sup>2</sup> It is stated by Hoveden, 337, that under Henry II., "*magno concilio celebrato, rex divisit Angliam in quatuor partes, et unicuique partium præfecit viros sapientes ad faciendam justitiam in terra sua. Isti sunt justiciæ in curia regis constituti ad audiendam clamores populi*" (fol. 37). Here it is evident that the phrase *in curia regis* means in the king's council, though it is often supposed that *curia regis* means a superior court of justice. The justices itinerant were not justices of any superior court; they were of an inferior order of judges, as is shown by the limitation of

the Crown, but with commissions, also, to hear pleas in actions as to realty, up to a certain value or amount, sent down to them by the chief justice, or chief justiciary, of the kingdom, or the chief council of the king.

The result of this administration of justice by the justices itinerant on the one hand, and of the study of the civil law upon the other, was that in the reign of Henry II., there was a marked improvement in our system of laws, as indicated by the great treatise of Glanville,<sup>1</sup> which shows an immense advance, and a great superiority over the former state of the law. And this advance was still further aided by the establishment of a superior king's court of civil jurisdiction,<sup>2</sup> and by allowing the defendant in an action the alternative

their jurisdiction, which was chiefly *capitula coronæ*; and "*capitula de Judicis*" (*i.e.*, to rob and oppress the Jews), and "*Placita per breve domini regis vel per breve capitalis justiciæ, vel a capitali curia regis, coram eis (justiciis) missa.*" The civil cases sent down were real actions; and the power of the justices itinerant in these cases was limited to a certain nature: "*De magnis assisis quæ sunt de centum solidis et infra,*" or "*De magnis assisis usque ad Decem Libratas Terræ, et infra,*" &c. Thus in the reign of Henry II., commissions were issued to the itinerant justices, which provided that suits as to real property not above a certain value, should be taken by them in the several counties; but that if questions of weight or doubt should arise, they should be reserved for the justices of the bench: "*Quod justiciæ faciant omnes justicias et rectitudines spectantes ad dominium regis per breve domini regis vel illorum qui in ejus loco erunt de feodo dimidii militis et supra. Nisi tam grandis sit querela quod non possit deduci, sine domino rege vel talis quam justiciæ ei reponunt pro dubitatione sua; vel ad illos qui in loco ejus erunt*" (*Hale's Hist. Com. Law*, c. 7). And the justices of the bench, (*i.e.*, of the bench of the exchequer, which appears to have been the only *curia regis* at that time,) were so called, to distinguish them from the justices itinerant, who were more numerous, and of less weight and authority.

<sup>1</sup> "Henry II.," says Hale, "raised the municipal laws of the kingdom to a greater perfection, and a more orderly and regular administration, than before. We need no other evidence of this than the treatise of Glanville, by comparing which with the laws of the Conqueror, or even the laws of Henry I., it will easily appear that the rule and order, as well as the administration of the law, was greatly improved beyond what it was formerly, and we have more proofs of their agreement and concord with the laws, as they were used from the time of Edward I. and downwards, than can be found in these obsolete laws of Henry I., which were indeed but disorderly, confusedly general things, if compared with Glanville's treatise of our laws" (*Hist. Com. Law*, c. 7, p. 120). Our author also observes of the work of Glanville: "The work of Glanville, compared with the Anglo-Saxon laws, is like the code of another nation; there is not the least feature of resemblance between them" (c. 4). But our author, through not having studied the *Leges Henrici Primi* and the *Mirror*, had missed the intermediate works in the chain of legal history, and lost the course of progression.

<sup>2</sup> The work of Glanville is confined to cases within the cognizance of the *curia regis*, which, it is plain, then meant a regular court of justice, which, there is reason to believe, was the exchequer. The defendant was allowed, in a writ of right, the option of trial by jury, but then the jurors were still witnesses, so that if they had

of trial by jury in preference to the brutal "battle," or duel. Thus, on the one hand, a regular judicature was established for determination of questions of law, and, on the other hand, an approach to an intelligent system of trial. There can be no doubt of the tendency of this to improve civil procedure, and to promote the development of law.

The distinguishing feature in the great work of Glanville, and that which more than anything else, perhaps, marks it as an era in our law, is the importance which it attaches to procedure,<sup>1</sup> and, above all, to an intelligent and rational system of trial, by selected and sworn judges, or jurors—precisely upon the principle of the Roman law—open to exception by either party, and so virtually agreed upon by both.

So as to criminal procedure,<sup>2</sup> although the old barbarian Saxon or Norman usages were not at once abolished; it was virtually superseded by its being postponed to, and made dependent upon, no knowledge of the case, Glanville was in perplexity as to what course ought to be pursued. Nevertheless, as Sir J. Mackintosh observes, "an important attempt was made to banish the absurd usages of ordeal and battle, and to *pave the way for the more general adoption of juries*, by allowing the defendant to support his right by the assize" (*Hist. Eng.*, vol. i.). The assize was, in fact, a trial by twelve jurors, called "recognitors," because they "recognised" of their own knowledge.

<sup>1</sup> The work is largely occupied with procedure. Thus, in describing the trial of an assize, the author is careful to lay down that jurors may be excepted against on the same ground on which witnesses in the court Christian were rejected; (a reference to the canon law, by which witnesses interested on either side were rejected); and, therefore, in order to provide for such objections to jurors, he points out that a larger number than twelve should be summoned, so as to allow for exclusion of some of them by either party (c. 12). It is to be observed, that though unanimity was required to the verdict of a jury, yet there was a rational course resorted to for securing it; that is, by the addition of fresh jurors until twelve should be obtained to decide in favour of one side (c. 17). It is observable that there is the principle of this course still retained in our criminal law, in which grand juries are composed of twenty-three, in order to allow for difference of opinion, and enable a majority of twelve to find or reject the accusation.

<sup>2</sup> Thus Glanville says, that on a criminal charge made by public fame, the truth of the matter should be inquired into by means of inquisitions and interrogations made in the presence of the justices, and by taking into consideration the probable circumstances of the facts, and weighing each conjecture that tends in favour of the accused, or makes against him; and it was only if the prosecutor made out his case by proofs that the accused had to purge himself by the ordeal (*per legem apparentem*, which Spelman considers means the ordeal), or entirely absolve himself of the crime imputed to him (B. xiv. c. 1). So that if the accused could, in the opinion of the judges, clear himself, or if there was not a sufficient case, he need not resort to the ordeal. It is not surprising to learn that the ordeal scarcely survived a single reign, and that a short one, after this; and that in the reign of Henry III., it is not heard of (*vide Hale's Com. Law*). So of the trial by battle, it was obsolete ages before it was abolished, though not abolished until our own age.

a more rational examination of the case, on the model of the Roman system; and thus the result was, that they soon became obsolete, and an intelligent system of trial by jury was, by a series of wise judicial decisions, substituted for it. Thus all the great changes in procedure were effected simply by affording the suitors the alternative of a rational system, and putting obstacles in the way of the other.

In the time of Glanville, indeed, civil procedure, though regular, was still in its most simple stage of regular procedure: still, in substance, it was the Roman system. It was conducted under a regular judicature: the case came first before judges, whose province was to settle the question to be decided, and to determine it if it was one of law, or to remit it to the jury—*i.e.*, to sworn judges; to determine it by regular trial, if it was one of fact. And though the discussion was oral, and not formal, it had all the substantial requisites of a rational system of trial, which, though not enforced to the exclusion of the old Saxon institution, was allowed as an option to the party sued, and was therefore virtually substituted: the other becoming gradually superseded until it was obsolete.<sup>1</sup>

The administration of justice, however, was still so unsatisfactory, that complaints were brought before the king in person, or his chief justiciary<sup>2</sup> sitting in the exchequer. But as the suits became more numerous, other justices were added, called justices of the bench,

<sup>1</sup> Thus Glanville says, in describing the procedure in a suit as to real property: "Both parties being present in court, it is usual to inquire of the tenant whether he can show any reason why the assize should not proceed." Then he goes on to say that it should not proceed if the case for the claimant was entirely admitted; but if not entirely so, then the court proceeded to decide the disputed points, whatever they might appear to be (b. 13, c. 11); and the trial might be by a jury. If no exception be taken in court, on account of which the suit ought to cease, then it shall proceed; and in the presence of both parties, the land shall be on the oath of twelve jurors, and according to their verdict be adjudged to the one or the other as described (*Ibid.*).

<sup>2</sup> Thus it appears, from a case in the *Abbreviatio Placitorum*, says John, that charters of exceptions were granted not to be sued except before the king or his chief justiciary; and in that case, in a suit against the Abbot of Leicester, he pleaded such a charter of king Richard: "quod idem abbas pro nullo respondeat, nisi coram ipso rege, vel capitali justiciario suo;" but it was decided that pleas decided before justices of the bench, were in law heard before the king. "Quia omnia placita quæ coram justiciariis de banco tenentur, coram Domino Rege vel ejus capitali justiciario teneri intelliguntur." This shows that, by that time, in the reign of John, the justices of the bench, as they were called, sat in the place of the king, and with or without his chief justiciary; and that there was a court in which common pleas were heard. In the reign of Henry II., the court called *curia regis* was well established, for

to distinguish them from justices itinerant; and thus a superior court, or *curia regis*, became by degrees established, in which common pleas between party and party, could be brought and heard. As this last, however, followed the king, and this was most injurious to the suitor, Magna Charta provided that common pleas should not follow the king; and hence a separate court of "common pleas," established at Westminster.<sup>1</sup>

The great charter made two important provisions with reference to common law judicature; one, that common pleas should not follow the person of the king, (which implied that they should be heard in some fixed court); and the other, that an order of judges superior to the justices itinerant should be sent down regularly into the counties to take all the "assizes" or actions relating to real property, substantially in substitution for the county court. The result of which, combined with the commissions of the justices itinerant to take the pleas of the crown, was to virtually supersede the ancient turbulent county court as a legal tribunal, in any but trivial matters.<sup>2</sup>

The institution of justices itinerant, the first approach to anything like a regular judicature, had a powerful effect on the gradual improvement of the law, by the development and embodiment of

Glanville has a treatise of cases determined in that court. Thus Magna Charta said that "*communia placita non sequantur curia nostra*:" that common pleas shall not follow our court; where it will be observed that the term *curia nostra* is used, as it is in the *Leyes Henrici Primi*, to signify, not a court of justice, but the royal court or residence; which shows how mistaken those are who suppose that from the mention made of *curia regis*, that there was necessarily a king's court of justice. And from that time, the court of common pleas became established.

<sup>1</sup> *Communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco. Recognitiones de morte antecessoris, &c., non capiantur nisi in suis comitatibus, et hoc modo; nos, vel capitalis justiciarius noster, mitemus duos justiciarios per unumquemque comitatum per quatuor vices in anno: qui, cum quatuor militibus ejus libet comitatus electis per comitatum, capiant in comitatu, et in die et loco comitatus assise prædictas. Et si in die comitatus assise prædictæ capi non possint tot milites et liberi tenentes remaneant de illis qui interfuerint comitatui die illo, per quos possint sufficienter judicia fieri secundum quod negotium fuerit, majus vel minus (Art. xvii., xviii., xix.)*

<sup>2</sup> Therefore in the reign of Henry III., as the *Mirror* states, the bishops and barons, whose attendance at the county court had been directed by Henry I., were excused from their attendance (*Mirror*, c. 1, s. 16). This is a fact of much significance in our legal history, and marks the era of the decline of the county court as a judicial tribunal. It was not, however, until the reign of Richard II., it was virtually deprived of that character. A statute of that reign directs that no lord, little or great, should sit upon the bench with the king's justices, when they came to take the assizes, under the general commissions first issued by Edward I.

legal principles in judicial decisions<sup>1</sup> by responsible judges, whose decisions were recorded and preserved, and might be the subject of complaint to the king in council, even before there was any regular appellate jurisdiction. It is an undoubted fact that such decisions were recorded and preserved, and by degrees insensibly moulded and altered the law of mere custom,<sup>2</sup> by reducing it to accordance with legal principle.

The decisions of the justices itinerant, especially when pro-

<sup>1</sup> Such decisions are recorded as early as the reign of John, in the *Abbreviatio Placitorum*, and at a later period in the work of Bracton. One or two are mentioned under the name of judicial ordinances in the *Mirror*. Sometimes there are decisions of justices itinerant, sometimes of the chief justiciary or his associates of the "curia regis," the royal court or council. Thus it is mentioned that Ranulph de Glanville, who was chief justiciary under Henry II., and the author of the celebrated Treatise, "ordained," that is to say, either judicially decided in some case, or made, with the assent of the council or authority of the king, a general judicial rule or ordinance, probably upon some case brought before the council by way of appeal or complaint, as cases at that time undoubtedly were. The effect of such judicial decisions must have been immense.

<sup>2</sup> There is a remarkable instance of this, quoted from the *Abbreviatio Placitorum*, by Hale. In the time of John, he it observed, as he mentions, the descent of common freehold land to the eldest son, was established, unless there was a special custom that the lands were partible, inter masculos; and therefore he says, Mich. secundo Johannis, in a (writ of) Rationabili parte bonorum, by Gilbert Beville, against William Beville, his eldest brother, for lands in Ganthorpe, the defendant pleaded, quod nunquam partita vel partibilia fuere, and because he could not prove it, judgment was given for the demandant, the younger brother. But by degrees, says Hale, whereas at this time the averment came on the part of the heir, that the land was *not* partible, nunquam partita vel partibilis extebit; in course of time the averment was turned on the other side—viz., that unless the demandant averred and proved that it was partible land, he failed in his demand (*Hist. Com. Law*, c. vii.). Now this, it is obvious, was by judicial decisions, thus practically altering the law, for it shifted the burden of proof, and thus, by degrees, it becoming impossible to prove a special custom, the right of primogeniture was established. These decisions, it will be observed, are cited from the Rolls, by the year of the reign of the king, and the county in which the cases were decided, and the name of the judge or justice itinerant by whom they were determined. The point of the decision is given shortly but clearly, and with all the requisites of a legal report. The brief entries in the *Abbreviatio Placitorum*, which are of the reign of John, are of great interest, as being the earliest of our law reports, and as embodying the very first germs or elements of regular law, afterwards so largely developed and expanded by a long course of judicial decisions founded upon them, and extending through the Year-books, from the reign of Edward II. to the reign of Henry VIII. It is manifest that these earlier decisions, studied in the work of Bracton, or derived, as he had derived them, from the Rolls, formed the basis of the subsequent judicial decisions, as they in like manner were the foundation of later ones; and so the law went on progressing gradually from one stage of development to another, until it was established as it existed under Elizabeth. It is manifest also that as the Saxon laws were barbarous, and the Norman usages little better, save so far as they had derived any light from the Roman law, there existed no source whence the judges of that age could have derived instruction in legal principle except that law; and as it is a historical fact

nounced by men of known learning and ability,<sup>1</sup> naturally had some weight and authority, and were recorded and regarded as precedents. And these, and the civil law, whence the principles on which they were founded were necessarily derived, formed the staple of the great Treatise of Bracton, which formed the basis of our common law.

Thus, under the influence of these great though gradual changes in our system of judicature, as contained in the great Charter, the law was still further developed, until it had reached the more finished state in which it is presented in the elaborate treatise of Bracton,<sup>2</sup> which marks the next great era in the history of our law.

that it was studied at that time, it may fairly be inferred that it was studied by the judges. It is at all events a fact that a great part of Bracton is taken from the civil law.

<sup>1</sup> Thus they are cited all through Bracton's Treatise, *De Legibus*; no doubt, especially those of known value from the learning of the justices who pronounced them, as, for instance, the celebrated Martin de Pateshall, who was a man of ability, and whose decisions were evidently regarded as of authority, and are cited in the *Mirror* as well as in Bracton. Thus, for example, Bracton cites and adopts a decision of his upon an important point as to donations of land to ecclesiastical bodies, that if the heir knew of the grant, "Et quod hæredes tenentur warrantizare si chartam cognoverint, vel probata fuerunt, habetis de itinere M. de Pateshall, de loquela diversorum comitatuum quæ fuerint super iudicium in itinere suo anno regni Henrici tertio de magistro militiæ Templi in Anglia" (*De Legibus*, lib. ii. c. 10). That is, he cites the case of the Knights Templar, which seems to have been an important case. So another decision of the same judge, to the effect that though a donation *in articulo mortis*, would not be valid, "Si autem tres dies vel quatuor ante mortem suam, dederit et seysinam domui religiosæ fecerit, non succurritur hæredi per assissam ad seysinam recuperandam; ut de ultimo itinere M. de Pateshall in comitatu Eborum" (*Ibid.*). Another point on the same subject is cited as decided—"De termino Hilarii anno regni regis Henrici in comitatu Norff, de Cecilia de Stradsete et Priore Hospitali Sancti Joannis de Jerusalem in Anglia"—the case of the Prior of the Hospital of St John of Jerusalem (*Ibid.*), and the cases are cited as decided in the king's superior court at Westminster, before the justices of the bench, so called to distinguish them from the justices itinerant, who were not permanently on the bench, but were sent on such itinera, and were not always judges (c. v. fol. 26.) "Dictum est in curia regis coram justiciariis de banco apud West. per Joh. de Mctingham et socios suos justiciarios" (*Ibid.*).

<sup>2</sup> In which, composed as it was by an ecclesiastic, and one who had studied the civil law, the influence of that law is, as might be supposed, plainly apparent. The charter of John was not observed, and the great charter of Henry III. was in 1225, containing the important enactments that assizes should be tried in the country by king's judges, and that matters of law should be determined in a fixed court at Westminster. Bracton, who was an ecclesiastic, and had studied the civil law, was a judge in 1245, and died about twenty years afterwards, and his great treatise was probably written in the course of that period. Lord Coke speaks of it in the highest terms, as one of the great sources of our law, though he was probably not aware that it was founded on the Roman law, and that a great part of it is taken, indeed, from the Institutes of Justinian.



The great feature of the work of Bracton is the attention it evinces to procedure, and the greater degree of care shown to carry out the principle of the Roman system, the ascertainment of the question in dispute, and the separation of the fact from the law, before sending the case to trial, which might, indeed, be useless if the matter was one of law; and hence the care which by Bracton will appear to have been given to enforce precision of statement on the part of suitors.<sup>1</sup>

In the time of Bracton we find the supremacy of regular judicature established, and the last remains of the rude and barbarous Saxon system virtually obsolete or abolished. This was done, not, indeed, by any direct abolition or sudden change, but by gradual alteration and indirect means, not the less effectual because unobserved.<sup>2</sup>

As the treatise of Glanville shows a great advance in our laws had been made in the time of Henry II., so the treatise of Bracton shows a still greater advance had been made in the time of Henry III.,<sup>3</sup> and this either from the resources of the civil law, or from the

<sup>1</sup> Thus, says Bracton, speaking of the writ of right, "it will not suffice simply to say, I demand such land as my right, unless the demandant (or claimant) make out his right, and show how and by what means it has descended to him" (*Bracton*, 374, b.). "Neither will it suffice to allege that the ancestor was seised in fee, unless it is added that he was so seised by right, which composes the right of property. Nor will this suffice unless he took the property; and it will be seen how this tended to eliminate the real point in dispute, and also to see if it was fact or law. No one at all acquainted with the Roman system can fail to see that this was derived therefrom, and as Sir J. Mackintosh observes—"It is impossible not to admire the logical art with which fact is separated from law, and the whole subject of litigation reduced to one or a few points on which the decision must turn" (*Hist. Eng.* vol. i.). The great feature of Bracton's work is the accurate and lucid manner in which this is followed out.

<sup>2</sup> The criminal jurisdiction of the sheriff was abolished by Magna Charta after it had probably become obsolete by the quiet substitution of itinerant justices, either by making them sheriffs or sending them into the counties by special commission to convene the courts. And so, as to civil cases, the sheriff was virtually made a king's judge by special writ in all but trivial cases, and from Bracton we learn that the sheriff exercised jurisdiction over matters which did not belong to him merely by his office of sheriff; but in such cases he acted not as sheriff, but by the king's precept, as *justiciarius regis* (*Bracton*, 154, b.). And as the suitor had to purchase this writ and pay for it, he would naturally consider that he might as well sue in the king's superior court, and have the advantage of a regular judge; and thus the *civil* judicature of the Saxons was superseded.

<sup>3</sup> Hale says, "We have two principal monuments of the great advance the English laws attained to under this king—viz., the tractate of Bracton, and the records of pleas, as well in the benches as before the justices itinerant, the records of which are still extant. Touching the former—Bracton's tractate,—it yields us a great evidence of the growth of our laws between the times of Henry II. and Henry III. If we do

gradual development, by judicial decisions, of principles and doctrines deduced therefrom.

In the celebrated treatise of Bracton we have the first formal treatise upon our law as a *whole*<sup>1</sup>—the first attempt made to reduce it to something like system, if not to science,—and it is impossible not to see that in a great degree<sup>2</sup> it is founded upon, if not almost copied from, the Roman law.

This is admitted by the historians of the Middle Ages. Thus Hallam wrote: “About the time of Edward I., the civil law acquired some credit in England, but a system entirely incompatible with it had established itself in our courts of justice, and the Roman jurisprudence was not only soon rejected, but became obnoxious” (*Europe in the Middle Ages*, c. ix.).

The only authority, however, cited for this is Selden, and Mr Hallam adds in a note: “Yet, notwithstanding Selden’s authority, I am not satisfied that he has not extenuated the effect of Bracton’s

but compare Glanville’s book with that of Bracton, we shall see a very great advance of the law in the writings of the latter over what they are in Glanville. The proceedings are much more regular and settled, as they are in Bracton, above what they are in Glanville. The book itself, in the beginning, seems to borrow its method from the civil law; but the greater part of the substance is either of the course of procedure in the law known to the author, or of resolutions and decisions in the courts of the bench, and before justices itinerant” (*Hist. C. L.*, c. vii.). But Hale, in the first place, greatly underrates the proportion of Bracton derived from the civil law. According to Sir W. Jones, it is almost entirely derived from that source, and certainly the greater portion of it. And as to the decisions of judges, which it cites, though these no doubt form some considerable part of it, yet it is to be observed that these decisions, like the doctrines of Glanville, must in the main have been deduced from the principles and doctrines of the Roman law; from whence else could it be derived, seeing that there was no other source to which judges or lawyers could possibly have resorted for instruction in law?

<sup>1</sup> The work of Glanville having only dealt with part of it.

<sup>2</sup> Sir W. Jones, in his treatise on Bailments, citing Bracton, said: “I am aware he has copied Justinian almost word for word” (p. 75); yet Lord Coke speaks of him as one of the highest authorities on our law, evidently in entire unconsciousness that he took his law from the Roman. Edward I., as Mr Hallam mentions, encouraged the study of the Roman law (*Hist. of Europe in the Middle Ages*, c. ix.), and in the reign of Edward II., when we have our earliest reports of the courts of law, it appears to have been cited, and on one occasion it was said by the chief justice of the Common Pleas, from the bench, *that our law was founded upon the civil law*—“*la ley imperiel, donques sur quel ley de terre est fondu*” (*Year-Book*, 5 *Edward II.* 148). So, Selden has preserved several instances in which it was cited, but it seems to have very much declined, and the celebrated treatise of Fortescue, *De Laudibus Legum Angliæ*, written in the time of Henry VI., is written in a tone of ignorant disparagement. Blackstone admits that Bracton, Fleta, and Britton contain frequent transcripts from the Roman law (*Comm.*, v. i. p. 22—Coleridge’s edition).

predilection for the Roman jurisprudence. No early lawyer has contributed so much to form our own system, as Bracton, and if his definitions and rules are sometimes borrowed from the civilians, as all admit, our common law may have indirectly received greater modifications from that influence than its professors were ready to acknowledge, or even than they knew. A full view of the subject is still, I think, a desideratum in the history of English law, which it would illustrate in a very interesting manner" (*Ibid.* p. 828).

Our author himself amply recognises at this era the influence of the Roman law in the formation of our own: "The study of the civil and canon law had contributed to further this improvement (of the law), and to furnish considerable accessions both of strength and ornament. Those two laws, besides exciting an emulation in the professors of the common law to cultivate their own municipal customs, afforded from their own treasures ample means of doing it. Much was borrowed from them, and engrafted on the original stock of the common law; but the manner in which this was done is very remarkable. Though our writs and records are in the language in which the Roman and pontifical jurisprudence are written and taught, there is not in either the least mark of imitation; the style of them is peculiarly their own. The use made of the civil and canon law was much nobler than that of borrowing their language. To enlarge the plan and scope of our municipal customs, to settle them upon principle, to improve the course of proceeding, to give consistency, uniformity, and elegance to the whole—these were the objects the lawyers of those days had in view, and to further them they scrupled not to make a free use of those more refined systems. Many of the maxims of the civil law were transplanted into ours; its rules were referred to as part of our own customs, and arguments founded upon the principles of that jurisprudence were attended to as a sort of authority. This was more particularly so in what related to personal property, while the laws of descent and purgation,<sup>1</sup> and other parts of our judicial procedure, seem borrowed from the canonical jurisprudence.<sup>2</sup> A considerable accession had been made to the original canon law by the publication of the decretals. This must have given new vogue and reputation to canonical studies, and no doubt encouraged the common lawyers of that age to pursue their inquiries in that way with more freedom. The application they made, whether of the canon or

<sup>1</sup> Upon the oath of the party.

<sup>2</sup> C. viii.

civil law, in treating subjects of discussion in the law of England, is visible from the account given of Bracton. To consider particularly how much of the latter is indebted to those two systems, either for its origin or improvement, would seem to be an object of separate consideration, and might, perhaps, make a proper appendage to a history of the English law."<sup>1</sup>

No doubt the law of England has always been entirely independent of the Roman law;<sup>2</sup> and it has only to any extent become incorporated into our law by voluntary adoption and assent.<sup>3</sup>

The influence of the civil law upon the formation of our own, as it had no compulsory authority, could only arise from its voluntary adoption, on the ground of its own excellence. And on that ground it gained the influence on our own law which, at this era in its history, led to such marked hostility, and manifest improvement.<sup>4</sup>

Whence, then, came this improvement in our law? It

<sup>1</sup> C. viii.

<sup>2</sup> Thus as to dower, in the Roman or matrimonial endowment among the Romans, it was to the husband rather than to the wife, though in our law it is to both. So though the principles of the law of inheritance, whether by testament or descent, were derived from the Romans, our law, except in some cities where by custom the Roman rules have prevailed, has departed from the Roman in various respects. So as to the effect of marriage, in legitimating previous issue, for the purposes of inheritance, though by Papal constitution that effect was given to it in the Roman canon law. Yet in the time of Glanville it was otherwise; and he says that, by the law and custom of the realm, the son born before marriage, "though by the canons and the Roman laws he is considered lawful heir, yet he is not so according to the law and custom of the realm, and cannot demand the inheritance by the law of the realm" (c. xv.) Upon which Lord Littleton remarks, that "it shows the entire independence of the law of England on the canon or civil law" (3 *Littleton's Hist. Hen. II.*, p. 125). But these instances are so few that they are exceptional, and the whole form and texture of our laws and institutions is plainly Roman.

<sup>3</sup> The parliament in the reign of Henry III., when an attempt was made to alter the law upon the subject noticed, declined to accede to it. "Et omnes comites et barones, una voce responderunt quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ" (*Stat. of Merton*, c. ix.). But this refusal was based upon the ground of user, and on the same ground, as we have seen, a vast deal of Roman law has become embodied with ours, and for the very reason that the adoption was voluntary, the superior excellence of the Roman law is made manifest. The commons in the reign of Richard II. declared that this country had never been governed by the civil law, which was no doubt meant in the sense of compulsory obligation or authority. But they were very little aware of the extent to which the civil law had even then been adopted into ours, and as barbarous Saxon and Norman usages died out, the ascendancy of Roman law became more marked.

<sup>4</sup> Thus Selden said of it—"Valet pro ratione, non pro inducto jure, et pro ratione, quantum Reges et republicæ intra potestates suæ fines valere patiuntur" (*Hist. Tithe*). It was always held, in our courts, that the civil or canon law had no force *proprio rigore* in suits on questions of temporal rights, &c. Therefore, Mic. 8 Hen. IV. pl. 72, *coram rege*, when the Chancellor of Oxford proceeded according to the

could not be derived from the *Norman law*; for, as our author himself observes, "it was not until after the publication of Glanville, and even of Bracton and of Britton, that the Normans had any treatise upon their law" (c. 4); "a work," he adds, "so like an English performance that, should there remain any doubt of its being formed upon our model, there can be no doubt of the great similarity between the laws of the two nations at that time" (*Ibid.*). But here our author forgot a fact which, had it occurred to him, would have satisfied him that the *Grand Constumier of Normandy* was derived from the English treatises which preceded it; viz., that, as Glanville himself mentions, the great merit of our system of assize or trial was, that it provided a substitute for the trial by battle, which was essentially the brutal mode of trial the Normans had adopted—not one whit better than the savage Saxon usage of the ordeal. The new system, therefore, was not derived from the Normans, who were as barbarous as the Saxons. It was derived by development from the Roman.

Arrived at this great era in our legal history, and at the era of the great reign of Edward I., which marks a still greater, it is natural to take at such a standing-point a retrospective view of our progress. And it is impossible not to be struck at this era with the fact that the main and *distinctive* features of the Saxon and Norman systems had already died out, or were declining and becoming obsolete; while all that was of Roman character or origin survived and endured. Trial by ordeal was gone; the turbulent county court, as a tribunal, was superseded; and trial by battle was disappearing; but the Roman systems of law and of justice were established. The best and most practical test of the Roman origin of our institutions, or how much we owe comparatively to Roman as compared with Norman or Saxon laws, is this; to see what are the institutions, either undoubtedly Saxon or undoubtedly Roman, which remain to this day. The institutions undoubtedly Roman—municipal and other corporations, certainly manors, and probably hundreds and counties; a regular judicature; and regular judicial tribunals, with skilled judges for the law, and jurors or sworn judges—*judices facti*—for the matters of fact—all these, and more, were Roman institutions,

rule of the civil law in a case of debt, the judgment was reversed in B. R. (King's Bench), the principal error assigned being that they proceeded "per legem civilem ubi quilibet ligueus Domini Regis Regni sui Angliæ in quibuscunque placitis et querelis infra hoc regnum factis et emergentibus de jure tractare debet per communem legem Angliæ" (*Hist. Com. Law*, p. 33).

and they remain. The institutions undoubtedly Saxon had gone, although the Saxon spirit which had been embodied in the old turbulent popular assemblies still survived, infused into Roman institutions, and inspiring them with fresh vigour. So of the Normans; all that was *distinctive* in their system, which seems reduced to trial by battle—since all the rest was derived from the Roman system—was already disappearing, and was doomed to vanish away, although it is true that the principle of the supremacy of royal authority was developed and applied by them, and formed a solid basis for all the improvements in our law which were afterwards attained. But this was a slow and gradual progression. So far as our law, however, in any material degree was altered after the Conquest, it was without any sudden change; and it was gradually and insensibly, and almost unobservedly,<sup>1</sup> and chiefly by means of legal decisions, developing the principles of law, which was indeed the custom of the nation.

The whole course and progress of our law, up to and after the age of Edward I., when it was substantially settled as it existed from that time to the age of Elizabeth, when our author's history closes, and when, as is observed in his Preface, a new era opened, resembled that of Rome, as one of gradual development; and, in the opinion of our most acute and philosophical historians, it exhibited, at this important period, the influence of the Roman law, which determined its whole character. Thus Sir J. Mackintosh

<sup>1</sup> This may be well illustrated by a reference to the law of descent. Lands held on the feudal military tenure, introduced at the Conquest, naturally became descendible to the eldest son; but other land—ordinary freehold land—held in free socage, as it was called, remained partible among all the sons, until long after the Conquest; so that it is impossible to ascertain the precise period when the law was altered, or rather it was not altered at any particular period; for it was altered thus—by holding that the land was partible only by custom. Thus Spelman says that “the Normans by their feuds settled the whole inheritance on the eldest son on account of military tenure” (*Spel. Reliq.* s. 3.) But in land not held by military tenure it was otherwise, and thus Glanville says in such case “the inheritance should be equally divided among all the sons, however numerous—*provided the land had been anciently partible*” (*Ibid.* c. 7, s. 3). “That is,” as Lord Hale puts it, “the *commune jus*, or common right, was for the eldest son to be heir, no custom intervening to the contrary” (*Hist. Com. Law*, 216). So that, as one learned writer on the subject said very truly, “the right of primogeniture made every day greater progress, until, in the reign of John, it had fairly excluded partible descent—the presumption being held to be that the land (unless in Kent, where, by a local custom recognised by general law, all land is held in gavelkind) was descendible to the eldest son until the contrary was proved” (*Robinson on Gavelkind*, p. 26). Thus a great revolution was effected in the country, gradually and unobservedly, and by a mere legal artifice, without any legislative sanction.

observes:—"The progress of our common law, till the reign of Edward I., bears a strong resemblance to that of Rome. The primitive maxims and customs were applied to all new cases, which, appearing similar to them, it was natural and convenient to subject to like rules. Courts in England, private lawyers, judicial writers, as at Rome, in delivering opinions on specific cases, extended the analogy from age to age, until an immense fabric of jurisprudence was at length built on somewhat rude foundations. The legislature itself occasionally interposed to amend customs, to widen or narrow principles, but these occasional interpositions were no more than petty repairs on a vast building. From the reign of Edward I. we possess the Year-books, annual notes of the cases adjudged by our courts, who exclusively possessed the power of authoritative interpretation, scarcely to be distinguished from the legislation which the tribunals of Rome shared with its imperial ministers and with noted advocates. In a century after him, elementary treatises, methodical digests, and works on special subjects, were extracted from these materials by Littleton,<sup>1</sup> Fortescue,<sup>2</sup> and Brooke.<sup>3</sup> So conspicuous a station at the head of the authentic history of our uninterrupted jurisprudence, has contributed, more than his legislative acts, to procure for Edward the name of 'the English Justinian' (*Hist. Eng.* v. i.).

Through all these successive changes, the great thing to be noticed is their slow and gradual character, and the careful manner in which they were each evolved, so to speak, out of actual experience and practical wisdom.<sup>4</sup> This, indeed, is the great lesson to be

<sup>1</sup> *Littleton's Tenures*, temp. Hen. VI., the subject of "Coke's Commentaries."

<sup>2</sup> *De Laudibus Legum Angliæ*, temp. Hen. VII.

<sup>3</sup> *Brooke's Abridgment of the Year-books*, temp. James I. The historian perhaps meant Fitzherbert.

<sup>4</sup> Sir James Mackintosh more than once remarks upon this; and he observes even of the Great Charter, "It was a peculiar advantage, that the consequences of its principles were, if we may so speak, only discovered gradually and slowly. It gave out in civil occasions only so much of the spirit of liberty as the circumstances of succeeding generations required—as their character could safely bear" (*Hist. Eng.* vol. i.). So as to the constitution of Henry II. sending the judges on circuits or itineraries, he observes that, "This, like others, appears only to have given authority and universality to practice occasionally adopted before" (*Ibid.*) Our law has always been customary, which implies gradual growth and formation. "The consuetudinary, or common law," remarks the eminent historian elsewhere, "consisted of certain maxims of simple justice, which we are taught by nature to observe and enforce, blended with certain ancient usages, often in themselves convenient and equitable, but chiefly recommended by the necessity of adhering to long and well known rules of conduct" (*Ibid.* p. 274).

learnt from the study of our legal history, as it was one of the chief advantages of our law, this facility of growth, of progress, and of happy adaptation to the wants of every age.

This, indeed, is the way in which, in a free country, institutions are developed, so to speak, gradually, by common agreement and tacit consent, from the results of practical experience.<sup>1</sup> The whole history of our law is a record of this process of development; the true merit of our free Saxon constitution is that it allowed of it, and left scope for it; and the great defect of our author is that he lost sight of it.

This has already been illustrated with reference to our judicial system, and may be remarkably illustrated with reference to the feudal system. The great feature of the era marked by the Conquest, is the commencement of the movement which was completed in the reign of Edward I., in the assertion of the civil supremacy of the sovereign power; and the most important aspect of this movement, and one in which it has produced consequences most permanent and most important, was its relation to the administration of justice; but it was also, and first, connected with the development of the feudal system,<sup>2</sup> and in both respects it was remarkable for its gradual character, and its Roman origin.

<sup>1</sup> This is pointed out by Sir James Mackintosh in a passage well worth quoting. "Governments are not framed after a model, but all their parts and powers grow out of occasional acts, prompted by some urgent expediency, or some private interest, which in the course of time coalesce and harden into usage; and thus this bundle of usages is the object of respect, and the guide of conduct, long before it is embodied and defined, and enforced in written laws. Government may be in some degree reduced to system, but cannot flow from it. It is not like a machine or a building, which may be constructed entirely and according to a previous plan, by the art and labour of man. It is better illustrated by a comparison with vegetables, or even animals, which may be improved by skill or care, but cannot be produced by human contrivance. No government can, indeed, be more than a mere draught or scheme of will, when it is not composed of habits of obedience on the part of the people, and of an habitual exercise of certain portions of authority by the individuals or bodies who constitute the sovereign power. These habits, like all others, can only be formed of repeated acts; they cannot suddenly be imposed by the legislator" (*Hist. Eng.* vol. i. p. 72). This fine passage is the best eulogy upon our constitution, —because pointing out its best feature.

<sup>2</sup> Guizot contests the view of most historians, that the feudal system was of sudden origin; the result of the special necessities of the age; and he contends that it was the progressive development of ancient facts" (*Lect. sur la Civiliz. en France*, Lect. vi.). He says the history of the word "miles," which designated "knight," is a proof of this, and he cites Du Cange, who thus traces its history to the Roman age, "Towards the end of the Roman empire, *militare* expressed simply to *serve*, to acquit one's-self of service towards a superior—not merely of a military service, but a civil service." And he elaborately traces the progress of the system.



The common notion that the feudal system was of sudden growth, is shown to be erroneous; it was the result of gradual development from the grants of land by the sovereign power in the Roman times,<sup>1</sup> to those who served for the defence of the state, and was, therefore, really based upon the manorial system. Hence it was, that its development by no means interfered with that system, or with the rights and interests which had arisen out of it; and thus these interests continued to be developed under it.

The growth of the feudal system was one of slow and gradual development from simple elements; the substance of it, tenure on military service, having existed from the time of the Romans; and it was only elaborated by the Normans. It was the development of a system which became complex in its character<sup>2</sup> from its involving so many incidents; and one of these connected it with the administration of justice.

In the legal history of this, or of any other country, nothing is so important as that which relates to the administration of justice; and in our own legal history, nothing is more remarkable than the

<sup>1</sup> It has been seen that such grants of land were made in this country by the Romans usually on military tenure; and our best historians—such as Palgrave and Lingard—conceive this to have been the germ of the feudal system. These estates became, under the Roman system, manors; and Guizot represents the villa or estates thus held, as military tenure, and under which the villeins held by servile tenure, as the basis of the feudal system. Then the barbarians seized large portions of land comprising their estates, and granted them unto others their companions in arms as military tenure; and through the entire Saxon laws, there are to be found traces of an infant feudal system, forfeiture to the lord, relief, &c. This was developed at the Conquest. Every owner of a manor was its “lord,” and had a court baron incident to it; and all the holders of manors were thanes or barons: those who held direct of the king being greater barons, others the lesser.

<sup>2</sup> Guizot points out that the system involved the nature of territorial property hereditary, and yet derived from a superior (as opposed to allodial property held of no one), the union of sovereignty with property, the lord having sovereign rights within the limits of his territory; and the present civil system of legislative, judicial, and military institutions which united the possessors of feuds among themselves. And he shows how, from the fifth to the tenth century, from causes he explains, freehold property became gradually less extensive, and land became converted into benefices; and how, from the tenth to the twelfth centuries, benefices became gradually converted into fiefs or feuds (*Lect. sur la Civ. en France*, lect. ii.). He insists, at the outset, upon its progressive formation. “No great social state,” he says, “makes its appearance complete and at once. It is formed slowly and successively: it is the result of a multitude of different facts of different origin, which combine and modify themselves in a thousand ways before constituting a whole. There is this much of truth, no doubt, in the view of those who attribute the feudal system to a special exigency of the times, that its promotion was aided and urged by the exigencies of the time, as it was suited to a period of limitation and transition; and hence it gradually disappeared when that age was over.”

gradual growth of a regular system of justice, derived from the principle of supreme sovereignty, and based upon a regular judicature, deriving its jurisdiction therefrom. At no time was there any sudden change, and yet the ultimate result was to render the justice of the state supreme in its character, even while local in its exercise.<sup>1</sup>

And one of the most remarkable features in the legal history of the period which intervened between the time of the Conquest and the age of Edward I., is, that along with the growth and development of the feudal system, founded on what may be called a military policy, there was a gradual growth and consolidation of the sovereign power,<sup>2</sup> by reason of a great social necessity; and thus a more regular judicature, and a more settled and satisfactory administration of justice.

The connexion of the subject with the administration of justice was this, that according to the strict principle of the feudal system, each lord exercised the judicial power in his own territory or domain,<sup>3</sup> as between his own tenants, or, in some cases, between them and their lord: a jurisdiction, however, it will be obvious,

<sup>1</sup> As already mentioned, long after the king's justices had been used to administer justice in the counties, either as sheriffs, or, in the place of the sheriffs, by royal authority, Magna Charta enacted that assizes should be taken in the counties, and that such pleas should be determined by a fixed tribunal. The result was, that the civil justice of the state, at the assizes, superseded the county court, in all important matters. Then the custom arose of compelling suitors in the county courts to sue out a writ from the crown to the sheriff, to give him jurisdiction by making him a king's justice in the case, if it was of more than small value: and this was fixed by custom at forty shillings—a sum, however, equivalent probably at the least to £50 in our own day.

<sup>2</sup> Guizot traces this progress, and describes this necessity very skilfully in his lectures upon Civilisation in France (lect. 10–15); and although he speaks particularly of France, all that he says is equally applicable to England, as our legal history will abundantly show. He traces the progress of the royal power as giving to royalty its character of a public protector, and as the fountain of the justice of the realm; and what he says of Philip Augustus, is eminently true of our Edward I. Under the royal power, he shows that the judicial system arose, and a regular administration of justice, under an order of persons—the judicial order—specially devoted to it, and having a general jurisdiction derived from the sovereign power. All this took place equally in this country.

<sup>3</sup> The principle was, that men should judge each other, of the same rank. Thus the tenants in the lords' courts judged disputes arising among themselves, or even between their lords and themselves, if arising out of the feudal relation. Otherwise, the question must be determined in the court of the lord's superior. The judgment by peers was essential, as Guizot says, to the feudal system. But then, as he also pointed out, there was no regular judicial system, no order of judges, no class of men charged with the judicial duty; while, on the other hand, the execution of judgments was a mere application of irregular force. There were, as he expresses it, no judicial guarantees by peaceful procedure (*Lect. sur la Civ. en France*,

necessarily limited, and extremely rude and unsatisfactory, and only suited to domestic matters. The feudal system had nothing like a regular judicial system, or a regular administration of justice. It involved, however, this great principle, which was carried out by Magna Charta, that a man should be judged by his peers or equals.

So, with reference to our political system, the same principle of gradual progress and progressive growth may be illustrated.

Nothing could be compared in importance with the judicial system, except the political;<sup>1</sup> and that also, like the other, was of slow growth and gradual development: from first rude elements into an organised system; from rude popular assemblies into regular constituted bodies. The political system, like the judicial, arose out of experience of the evils of the feudal; and just as the practical social necessity for regular judicature, and a comprehensive administration of justice, led to the establishment of the courts of sovereign jurisdiction, so the political necessity for a regularly constituted body of representatives to assess feudal impositions, and adjust feudal burdens, led to the constitution of popular elective assemblies. For electors, or for jurors, some great constituent body of freemen, it appears, was required; and the same constituency originally served for both.

The two systems had this in common, that they were both, necessarily, in the main, based upon the same great constituency: the freeholders in the counties, the burgesses in the towns and cities.

These bodies, from whom the juries came, were also the bodies upon whom the political franchise was ultimately conferred.<sup>2</sup> They lect. 10). Hence arose, as he shows, a general sense of the necessity for some complete jurisdiction which should comprehend all classes of cases, and some regular system of justice, which should deal with them judicially; and this could only be derived from the sovereign power.

<sup>1</sup> Allusion is here made, of course, to the rise of a legislative assembly, founded upon popular election. There is a masterly sketch of it in the history of Sir J. Mackintosh (v. i. c. 5), who shows its gradual rise from the time of the great council of the Saxons and Normans, to the regular return of popular members in the age of Edward I. He cites from Bracton some words in which allusion is made to that council: "*Legis habet vigorem, quicquid de consilio et consensu magnatum, et reipublicæ commune sponsione, autoritate regis, iuste fuerit definitum*" (lib. i. c. 1, fol. 1). And he traces its rise partly from the feudal system itself, in this way, that the scutages and aids under that system were levied by the consent of the tenants; that the crown, by degrees, exacted talliages from those who were not military tenants; and that this led by degrees to grants of subsidies by representatives of the counties and the burghs, and thus to a House of Commons.

<sup>2</sup> Thus Sir J. Mackintosh points out that the suitors at the county court—from whom it has been shown the juries came—became afterwards the voters at county elections; and that, as the suitors acquired votes, the whole body of the freeholders

formed, then, the great mass of the free subjects of the realm, at a time when to be a freeholder was to be a freeman, and when the only freemen were freeholders. In later times, when, on the one hand, freeholders—by reason of the division of estates, and the mode of emancipation—had multiplied, and many of them were holders of very small properties, qualifications became required; and, on the other hand, as the villeins acquired customary rights, and became merged in the modern copyholders; and, as leasehold estates became stable, they became virtually as much entitled to judicial or political franchises as freeholders, and became included among the constituencies of the jurors or electors. But the system remained, in substance, the same, through all these changes, and laws were only altered by reason of changes in the circumstances of society, and in order to preserve the substantial identity of our institutions. In a word, laws were altered, that institutions might be maintained.

As gradual progress and slow development marked the character

became the constituencies in counties. And some part of the same process, he thinks, may be traced in the share of representation conferred on the towns. These communities had retained, he says, some vestiges of their elective forms, and of that local administration, which had been bestowed on them by the civilising policy of the Roman conquerors; and in England, charters were early granted, which exempted towns from baronial tyranny, and recognised their local laws. The boroughs, however, were part of the ancient demesnes of the crown, and were subject to the feudal incidents. Talliages were levied, and subsidies demanded; and this led, as in the counties, to their sending representatives to parliament. When the consent of parliament was made necessary to the levy of talliage, of subsidies, and, in effect, of all taxes, as well as of the feudal dues, in the latter years of Edward I., the burgesses became integral and essential parts of the legislature (*Hist. Eng.*, vol. i.). The burgesses and freeholders formed the body of the electors, as they did of the jurors; and as, at the same time, freeholds had become divided, and many of them were small, qualifications were deemed necessary in order to secure men of substance. It is very observable that the earliest legislation on this subject had reference to jurors; and there was an act of Edward I., the first of a long series of similar acts, directed to secure substantial men for jurors. In the reign of Henry VI., the well known act was passed which required a qualification for electors of knights of the shire, the qualification being an annual income from freehold of forty shillings, the same sum, as already shown, fixed for the exclusive jurisdiction of the county court, and equal to £50 at the present day (*vide p. civ.*) In the reign of Edward IV., copyholders were held to have legal customary rights to their tenements; and about the same time, leaseholders, likewise, had their estates fully recognised and protected in law; and in later times, copyholders and leaseholders, to a certain amount, were admitted as jurors and electors. Here we see the alteration of laws in order to adapt them to the altered circumstances of society, and preserve the substantial identity of institutions:—all based on the same general principle, that of founding our judicial and political systems on the broad and solid ground of a substantial interest in the property and liberty of the country.

of our legal history from the Conquest to the reign of Edward I., it was equally so from the age of Edward I. to the reign of Elizabeth, which closes our author's history. As the former period was marked by the gradual development of the feudal system, so the later period was marked by its slow and gradual decline;<sup>1</sup> and as the former period was marked also by the establishment of a general judicial system, based upon the supremacy of sovereign power and authority, so the latter period, long as it was, hardly had elapsed before its entire ascendancy was attained.<sup>2</sup> The progress of decay was as slow as that of growth. Old systems were rarely ever abolished, and were left to become obsolete, and died away as they had arisen up—by slow degrees.

During this long period, the anomalous jurisdiction of those local courts, which had existed in most of our villages and towns from the time of the Romans, and many of which had criminal jurisdiction in capital cases, gradually died out, save as to the local jurisdiction, to which the county court had virtually been limited; and except as to the civil courts of some great cities, as London and Bristol.<sup>3</sup> This, however, it must again be observed, was by a slow and gradual progress; and to observe and trace this progress is the great object of legal history.

No institution—at all events none which *endured*—was all at once established; none was all at once abolished. Every change, either in the way of abolition of old institutions or the introduction of new, was gradual and progressive. Each alteration ad-

<sup>1</sup> In the reign of Elizabeth, the feudal system had become in a great degree, if not entirely, obsolete; and the last instance of a claim of villenage occurs in the reports of that reign (*Yelv. Reports*, 2). So in this long reign the last instance occurred of "trial by battel," which was not abolished until our own day, and so as to "wager of law," (by the oath of the defendant), the remains of the Saxon system of compurgators. So also in this long reign the local criminal jurisdictions (save such as were derived from royal authority) died out (*vide Crispé v. Viroll*, *Yelverton's Reports*), never having been directly abolished.

<sup>2</sup> The state system of justice was left to assert its superiority over the other, only by *reason* of its superiority.

<sup>3</sup> The jurisdiction of these courts was in ancient times criminal as well as civil; and hence, in the reign of Edward IV., there was an instance of a capital execution by sentence of a court-baron. In the time of Richard III., we find it mentioned in the *Year-Book* that the steward of a liberty had executed a man under colour of what the Saxons called "engfangenthief," or taking a thief in the act, within the manor or other liberty (*Year-Book*, 2 Richard III., f. 9, s. 10). So, as lately as the reign of Elizabeth, it was admitted that the local court of the cinque courts could try and execute a man for murder committed within the liberty, provided he could be taken there; for otherwise he could only be arrested and tried at common law (*Crispé v. Viroll* *Yelverton's Reports*, 13).

vanced by degrees from its first germinal element and imperfect form, on its original introduction, until it had reached its final stage of development into a perfect and settled institution. Thus it was, for instance, with trial by jury,<sup>1</sup> which, in its *present form*, was never established or set up, but grew by degrees, from its first form into its present, in the course of several centuries.

The two great difficulties in the way of an efficient and satisfactory administration of justice were as to the proper mode of trying questions of fact, and as to the method of securing certainty and

<sup>1</sup> All through the Saxon laws, its first germ or element can be traced in the usage of selecting such of the suitors of the county court as had any knowledge of the matter, and making them sworn witnesses or jurors. Before the Conquest, it was the usage in criminal cases to swear, and even after the Conquest it was adopted in civil cases. From that step, however, to trial by jury in the later sense of the phrase, there was a long interval; for these jurors were witnesses, and if there were no witnesses, there could be no jurors. The earliest mention of a trial by jury, says our author, that bears a near resemblance to that which it became in after times, is in the Constitutions of Clarendon, where it is directed that the sheriff "*faciet jurare duodecim legales homines de vicineto seu de villa quod inde veritatem secundum conscientiam suam manifestabunt*," (1 *Reeve's Hist. Eng. Law*, 87). The proceeding was "*per recognitionem*," or by recognition—of their own knowledge. Some, or all, might know the truth of the matter, or might be ignorant of it. If none of them knew anything of the matter, and they testified the same in court upon their oaths, the court resorted to others, *until they found those who did know the truth*. If some were acquainted with the facts, and some were not, the latter were rejected, and others called in. And all who were called in were sworn not to speak what was false; and the knowledge they were expected to have of the matter must have been from what they themselves had seen or heard, or from declarations of their fathers, such evidence as claimed equal credit with that of their own eyes or ears, "*per proprium visum suum, et auditum, vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis*" (*Glanville*, lib. ii. c. 17; *Reeve*, 13; *Bracton, De Legibus—De Assise*). That in the time of Henry II. the jurors were still witnesses, is clear from the *Treatise* of Glanville, who treats of trial by jury in the *curia regis*, the king's superior court, and calls the jurors "*recognitors*," because they "*recognised*" of their own knowledge; and when he has to deal with the case of their having no knowledge of the matter, betrays considerable perplexity (c. 14). So in the *Mirror*, where ordeal and trial by battle are mentioned as modes of proceeding resorted to from necessity, where there were no witnesses of the matter, so that there could be no trial by jury. So Bracton, *temp.* Henry III., long after Magna Charta, speaks of the jurors as deciding upon what they had seen or heard (lib. iv.) And it took probably at least another century, if not more, before juries were of sufficient intelligence to listen to and decide upon *evidence*. This stage in the history of trial by jury had, however, been reached in the reign of Henry VI., because we find Fortescue, his chancellor, describing trial by jury as a trial by *evidence*; and in the Year-Books of that reign there is a case about showing a man evidence in a lawsuit (*Year-Book, Hen. VI.*) But this development, it will be seen, took ages. From the time of Ethelred to Edward III. is a period of five centuries. That trial by jury arose out of the court of the hundred is manifest from this, that by the course of the common law the jury must always have been composed of hundredors, unless there could not be sufficient impartial jurors therefrom, in which case the writ of *decem tales* was

uniformity in matters of law; it took centuries to settle and to solve. It may appear easy to hear witnesses; but the difficulty has always been great of deciding upon contradictory testimony, and discriminating the balance of credibility.<sup>1</sup> And it was not until the people had acquired some experience in the administration of justice that this difficult duty could be exercised by them,

awarded, to summon jurors from the adjoining hundred (*Year-Book*, 3 *Henry VI.*, 39). An essential quality of a juror being that he should come from a place as near as possible to the place where the matter arose; at all events, out of the hundred (*Co. Litt.*, 155). So that it came to this, that the common law jury were simply *twelve of the hundredors sworn*. Up to the time of Elizabeth it was a cause of challenge to a juror, that he was not a hundredor (*Waters v. Walsh*, *Bendl.* 263). The jury, indeed, must have come *de vicineto*, from the vicinage of the place within the hundred where the matter arose, as from a vill or manor (*Co. Litt.* 125); but it must have come from the *hundred*. It was not until the 4th and 5th Anne, c.xvi. s. 6, that it was enacted that the want of hundredors should not be a cause of challenge to a jury, and that they might come from the body of the country.

<sup>1</sup> It was for ages a firmly rooted rule of the law that the jury must come from the "vill," or vicinage, a rule plainly derived from the old system of the county court, held in the hundred, from month to month, or in which the neighbours from the hundred where the matter arose would be called upon to testify. Hence a fixed rule that there must be hundredors upon a jury, which existed until Lord Somers' act for the amendment of the law. The rule originally arose no doubt from the principle that jurors were witnesses, and, of course, to be witnesses they must come from the neighbourhood, and the nearer, it was thought, the better. And even at a later period, when jurors had evidence given, and no longer decided on their own mere knowledge, their knowledge of the parties, it was thought, would assist them in judging of the testimony. This is well put by Fortescue, c. xxvi., "Twelve good and lawful men being sworn, &c., then either party by himself or his counsel shall open to them all matters and evidences whereby he thinketh that he may best inform them of the truth, and then may either party bring before them all such witnesses on his behalf as he will produce . . . not unknown witnesses, but neighbours," &c. And then, in c. xxviii., "The witnesses make their depositions in the presence of twelve credible men, neighbours to the deed that is in question, and to the circumstances of the same, and who also know the manners and conditions of the witnesses, and know whether they be men worthy to be credited or not." At that time, it will be observed, the jury had ceased to determine merely upon their own knowledge, and had evidence given; for there are cases in the *Year-Books* at that time as to obtaining of evidence. Moreover, there is a case in the *Year-books* that a man may enter another's park, to show him evidence in a lawsuit (*Year-Book*, 17 *Hen. VI.*). The theory of trial by jury is thus explained by Hale: "In this recess of the jury, they are to consider the evidence, to weigh the credibility of the witnesses, and the force and efficacy of their testimonies, whence they are not precisely bound by the rules of the civil law—viz., to have two witnesses to prove every fact, (unless it be in cases of treason), nor to reject one witness because he is single, or always to believe two witnesses, if the probability of the fact does, upon other circumstances, reasonably encounter them; for the trial is not here simply by witnesses, but by jury; nay, it may so fall out that a jury, upon their own knowledge, may know a thing to be false that a witness swore to be true, or may know a witness to be incompetent or incredible, though nothing be objected against him, and may give the verdict accordingly" (Hale, *Hist. Com. Law*, cited in *De Lolme on the Const.*, c. 13).

which is of the essence of trial by jury. Then, and not until then, its advantages were fully attained, and this it took several centuries to attain.

All the advantages of a local tribunal were gained, it was considered, by sending a case down for trial, (where there was no special reason why it should not be so), into the county, to be tried, and having a jury from the vill or vicinage, (as it was called,) where the matter in dispute arose, in order that it might be tried by neighbours of the parties, with such knowledge of them and of the subject-matter as might either enable them to decide the case of their own knowledge, or serve to test the credibility of the witnesses brought before them to give evidence. On the other hand, if the suitors were desirous of resorting to the old system of arbitration by neighbours,<sup>1</sup> it was always open to them to do so, by referring their cases to such arbitration, on the principle of mutual selection and assent. This principle, indeed, has never been abandoned in our legal system; but the domestic jurisdiction of arbitration has always been maintained.

Thus, by slow degrees, and in the course of several centuries, the institution of trial by jury, as it now exists, was ultimately established. So as to the ascendancy acquired by the king's courts as courts of ordinary jurisdiction; it was only acquired by slow degrees and gradual progression. By degrees it became established as a rule or maxim, quite contrary to ancient usage,<sup>2</sup> that without

<sup>1</sup> Thus in the *Year-Book* it was said, speaking of challenges to jurors, "If the plaintiff and the defendant do both refer themselves to the arbitration of certain persons, to act for *both*, it would be good, that is, where one side chooses one and the other another; there, although they are to be on different arbitrations, yet as each is unknown to the other, it is good cause of challenge" (*Year-Book*, 23 *Hen. VI.*, 39). Arbitrations have always been allowed in our law, although some attempts were made to confine their jurisdiction (14 *Hen. IV.*, 19). In Lord Coke's time it was not unusual for men to agree that differences between them should be referred to the arbitration of "neighbours" (*Co. Litt.*, lib. i. c. vii., s. 67, p. 53); and although questions were raised as to the power to refer *future* differences, no question was ever raised as to *present* differences.

<sup>2</sup> For before the Conquest there was no other court but the county court; and even after the Conquest suits relating to land to any extent came into that court, as was seen in the celebrated case relating to the Bishop of Rochester's lands, which is mentioned by all historians as tried in the county court; and so of other cases, although, if they concerned the sheriff, or for any cause could not be properly or fairly tried before him, a king's justiciary was sent down to *hold* the court, as in the first case mentioned, and in others recorded of the time. The jurisdiction between lord and *tenant* was in the court of the *lord*; but where different *lords* claimed, the suit could only come into the court of their superior lord, and of course the ultimate court was that of the lord paramount—the king. By degrees it



the king's writ there could be no jurisdiction over suits relating to land, a doctrine no doubt partly deduced from the principles of the feudal system, which made the court of the superior lord the tribunal for controversies between inferior lords which could not be determined in the courts of either.

Then as regards personal actions, the rule which limited the jurisdiction of inferior local courts, courts baron, or the like,<sup>1</sup> to cases not exceeding the amount of forty shillings was applied to the county court, which, at the time the supposed rule must have originated, was the only court of ordinary jurisdiction.

Even, however, if the jurisdiction were limited to forty shillings,<sup>2</sup>

became established that the sheriff could not hold plea of land without the king's writ, whence it is said by Bracton, *temp.* Henry III., that in such cases the sheriff sat, *not* as sheriff, but as king's justiciary (*Bracton*, fol. 176). Then, as we find from the *Mirror of Justice*, after justices itinerant had been sent (in the reign of Henry I.), suits of too high a nature for the sheriff, as suits relating to land, were deemed to be and were suspendable until the coming of the king's justices into the county (*Mirror*, c. ii. s. 28). Then, in the time of Henry II., when a *curia regis* (the exchequer) was established, chiefly for suits as to land, those suits were naturally brought there, the king's writ being required to bring them in the county court. Thus by slow degrees the maxim became established, as Fleta expresses it, that without a king's writ there was no warrant of jurisdiction in land. Now, a king's writ meant a *fee to the king*, for fees were charged for his writs (which the *Mirror* bitterly complains of); and a principle so valuable to revenue was not likely to be lost sight of by the Norman sovereigns. So, in the reign of Edward III., it was held that if upon writ the question of title arose, it should be determined in the county; but otherwise, if upon plaint, it should be removed into the court of the king (*Year-Book*, 30 *Ed. III.*, f. 28).

<sup>1</sup> That the rule originally applied only to these courts appears plainly from the *Mirror*, which, in describing the jurisdiction of inferior courts, *temp.* Edward I., first mentions the county courts, saying nothing of any limitation of jurisdiction. Then it proceeds—"The other inferior courts are the courts of every lord, to the likeness of hundred courts, and also in fairs and markets in which justice is administered without delay, in which courts they have cognizance of debts and of such small things as pass not forty shillings in value (c. i. s. 15). But it is obvious that the rule could not have applied to the county court, the only court of ordinary jurisdiction, and which, even in the reign of Henry I., was called "*curia regis*."

<sup>2</sup> In the time of Alfred or Athelstane a shilling was the penalty for stealing a foal or calf (*Laws of Alfred*, c. xvi.). An ox was worth only thirty pence (*Judicia Civitatis Londiniæ*), and a cow twenty pence, and a sheep a shilling, (a shilling being fivepence in Anglo-Saxon currency). The whole value of a citizen's property was often only thirty pence, or six shillings (*Ibid.*). The pecuniary penalty for a man's life was only thirty shillings (*Anglo-Saxon Laws*). These instances may suffice to give an idea of the relative value of forty shillings, before the Conquest, and at the present day. And although in the *Mirror* forty shillings is spoken of as comparatively a small sum, that was in comparison with suits for property to any amount, and the book was completed in the reign of Edward I. Even taking that era, however, it would be difficult to give forty shillings a less comparative value than fifty pounds at the present period. Forty shillings a year was the amount of income

it is certain (though it is difficult to form a correct idea of the relative value of money, in an age so distant as that in which such a limitation must have arisen), that the amount could not have been less than fifty pounds of our present currency.

There were, however, many undoubted advantages to be gained by bringing suits in the king's superior courts, and it was often, indeed, a matter of necessity to do so. There was one very evident ground of necessity, upon which the prerogative of justice was vested in the sovereign—viz., that from the supreme power alone

fixed by the legislature in the reign of Henry VI., as the qualification for knights of the shire. Twenty pounds a year was the salary of a judge in those days (Foss's *Lives of the Judges*, vol. vi. pp. 3, 41, 54, 61), so that forty shillings was a tenth of it, which, as the salary of a judge is now five thousand pounds, would make the present equivalent of forty shillings not less than five hundred pounds. It is difficult to get an accurate idea on the point, and the estimate may vary between fifty and five hundred pounds; one is the *minimum*, the other the *maximum* amount of the present equivalent. At the time of Magna Charta twenty shillings was the sum due on every knight's fee, on the marriage of his daughter, and two shillings was an ordinary subsidy on a "plough land," i.e., in modern language, a farm, (Wade's *History of England*, temp. Henry III., p. 49). Madox says the king in that reign gave his poet one hundred shillings salary; the salary of the poet laureate is one hundred pounds, just twenty times as much in moneys numbered, but how much in point of real effective value, a few further data may help to show. In the reign of Edward III. the famine price of wheat was twenty shillings (Wade's *History of England*, p. 50), and forty shillings was the amount of the capitation tax of a baron (*Ibid.* 58). A bailiff in husbandry received less than forty shillings a year as his salary in the reign of Henry VII. (*Ibid.* p. 104). Now he would receive at least fifty pounds. In the same reign forty shillings a year was all that was allowed for the whole washing in the household of a great peer like the Duke of Northumberland (*Ibid.* 109). In the reign of Edward IV., as we learn from the old ballad "King Edward IV. and the Tanner of Tamworth," a wealthy tradesman boasted of a horse for which he paid four shillings. Now-a-days a rich tradesman would hardly boast of a horse for which he paid less than fifty pounds. In the reign of Henry VIII. the pound of beef was a halfpenny a pound, now it is one shilling, just twenty-four times as much, which again makes forty shillings equal to about the sum of fifty pounds. Lord Coke, in commenting upon the limitation of forty shillings, remarks that this was equal to six pounds in his time. But the effect of the discovery of America was vastly to decrease the value of money, insomuch that it sank two-thirds in value, and hence Hume observes that a crown in Henry VII.'s time served the same purpose as a pound in his own time (*Essay on Money*). But the comparison of data shows that the difference was far greater, and the lowest possible estimate makes the present equivalent of the ancient forty shillings at least fifty pounds. Lord Coke says that a day's "plough service," which, of course, comprised the use of the horses or oxen with the plough, and a man to hold the plough, and another to guide the horses, in his time, would be compensated for by eightpence (4 *Inst.* 269). That was in the reign of James I., after the long reign of Elizabeth, when such a prodigious advance had been made in wealth. And the sum of eightpence at that time, was, no doubt, worth ten times what it was at the time of the Conquest, as it was probably worth a tenth part of what it would be worth now. A penny, in the Saxon times was at least equal to a shilling now, and only fivepence made a shilling.

could emanate the authority to enforce justice. This was most apparent in that age of turbulence and violence, when it was constantly necessary to resort to force to execute the law,<sup>1</sup> and when men, on the other hand, were always ready either to enforce or to resist it by a recourse to force. In such an age, to allow any but the officers of the State to execute it, would have led to anarchy and civil war.

The turbulence which characterised the county courts continued to disturb trials in the counties, even after a more regular administration of justice had been established, and under the itinerant justices sent by the crown into the counties, and the administration of justice was often so disturbed by local "routs,"<sup>2</sup> or by the influence

<sup>1</sup> By the common law, the sheriff was the minister of justice, and could take any sufficient number of men to assist him (*Brook's Abr.* "Forcible Entry," 8; *Year-Book*, 22 Hen. VI., 37). And men were accustomed to assemble with force and arms, and either to enforce what they considered justice, or to resist it. Hence, though the law allowed of personal self-defence (*Year-Book of Edward IV.* 28), and even allowed of violence in defence of property in actual possession, even to regain possession after recent dispossession, it did not allow of violent attempts to regain possession after the wrongdoer had acquired peaceable possession (*Mirror*, chapter on "Disseisin"). Hence the statutes of forcible entry, to prevent men from making forcible entry even into their own lands, if with arms, or terror of actual bodily violence (*Year-Book*, 8 Hen. VI., 9). These statutes, Coke said, were in affirmance of the common law, for, says he, the law abhors violence (3 *Coke's Reports*, 12). And it was laid down that if a man came with many, even of those who were accustomed to attend upon him, it was force (*Year-Book*, 10 Hen. VII., 72). And in the *Mirror* it is said that not only swords and spears, but clubs and staves, were "arms." That men did in those days gather together in numbers, armed with weapons, in order to enforce what they deemed justice, or to resist the law, is apparent from the reports in the *Year-Book*, and from contemporary history. Thus in the *Paston Letters* we find a place in dispute held by one body of armed men, and regularly besieged and assailed by another, and a man actually killed in the fray (*Letter* 281). So in the *Year-Book* of Henry VI. we find a case in which a case was adjourned from the assizes "because the parties in their own counties came with great routs of armed men, more as though they were going to battle than to an assize" (*Year-Book*, 7 Hen. VI.; 33 Hen. VI. 9). In such a state of society to allow every suitor to enforce justice would be to allow of civil war, and lead to anarchy. Hence the doctrine was established, of necessity, that it was only the ministers of the king, the sheriff and his officers, who could use force to execute the law, although under him and in his aid, the whole county could act, and thus under the statutes of forcible entry the justices of the peace were allowed to use force to remove force (*Year-Book*, 21 Hen. VI., 5, 7 *Edw. IV.*, 18).

<sup>2</sup> Thus, so early as the reign of Henry I., it was mentioned as a cause of failure of justice, which drew causes into the king's court (*Leges Hen. Prim.* c. vii.) And even when king's justices went down into the counties, it is not to be supposed the evil entirely abated, and it truly appears that it had not. The *curia regis*, certainly, as early as the reign of Henry II., took cognizance of causes which previously would have gone into the counties, for Glanville wrote his Treatise upon it. And the charter of Henry III. provided that the common pleas should be taken in a fixed court, and that the evil continued, as will show. An assize was arrayed before

of local magnates, that it was necessary to remove cases into the *curia regis*, the king's superior court.

Independently of the turbulence of the county court, there were various reasons for the removal of causes therefrom, or from other local courts, into the king's superior courts. The power of the county court, or any local court, was strictly limited by its local jurisdiction;<sup>1</sup> whereas the king's superior court had jurisdiction over the whole country, and could send causes for trial into any county, or summon parties to attend in any county.

Again, it was often necessary to remove causes from the local court, to avoid a failure of justice, on account of the deficiency of

Sir Wm. Babington and Strange, in the county of Cumberland, and it was adjourned before them at Westminster, and Fulthorpe asked of the justices the cause of the adjournment, and Babington said that it was because it was a great matter, and the parties in their own counties came with great routs of armed men, more like as though they were going to battle than to an assize ("les parties en leur propre countees, viendront ove ground routs des gents armes, plus semble pur venter a bataille que al assize"), and so for danger of the peace being disturbed; and also for that counsel were in London, and the parties could be better served in their right, the case was adjourned (*Year-Book*, 7 *Hen. VI.*). See *Year-Book*, 32 *Hen. VI.* 9, where a trial in the country was denied in a cause between the duke of Exeter and Lord Cromwell, "because there had been a great rout, and a greater would ensue if the trial should take place there, for my lord of Exeter is a great and potent prince in that county (un ground et prepotant prince)" (*Year-Book*, 32 *Hen. VI.* 9). The *Paston Letters* afford many instances of similar proceedings at assizes about the same period. In modern times the courts have always recognised that it is a good cause for removing a case into another county for trial, that there is a popular excitement and doubt of the possibility of fair trial.

<sup>1</sup> Thus in an assize, where the tenant set up a release, the witnesses of which were in divers counties, the case was adjourned to the king's court at Westminster, "which had jurisdiction over the whole country" (*Year-Book*, 7 *Edw. II.* p. 231). Various modes were provided for removal of causes into the superior courts, writs of "pone," "recordari," or "certiorari" (*Year-Book*, 7 *Edw. IV.* 23, 34 *Hen. VI.* fol. 43). The plaintiff might always remove a cause at his will without cause, for, of course, he would not needlessly delay his own suit, and there could be no disadvantage to the other party in removal of the case from the court of the county; but the defendant could only remove a case for good cause shown (*F. N. B. Recordare*, 79). Thus so early as *Year-Book*, 50 *Edward III.*, it was said by Belkenap, J., if a stranger comes into the Cinque ports and commits a transitory trespass, and afterwards goes out of their jurisdiction, he to whom the trespass is done may have an action at the common law; for it is more for his benefit to have the suit at the common law than within the Cinque ports, for they have no power to summon any man that is out of their jurisdiction, viz., in the county of Kent, or elsewhere, into the limits of their jurisdiction. And thus an appeal of felony was held to be in Kent for a murder in their jurisdiction, "because although the Cinque ports have several liberties (i.e., local courts), yet the reason of the grant of these liberties was for the ease and benefit of the inhabitants, and not for their prejudice" (*Crispe v. Viroll*, *Yelverton's Rep.* 13); and it would be for their prejudice if they could not follow murderers or debtors out of their own limited local jurisdiction.

suitors or jurors, or the influence of one of the parties over them, from their being, most of them, or all of them, his tenants, or from the lord having an interest in the case, or other causes likely to prevent a fair trial.<sup>1</sup>

Nevertheless, notwithstanding the obvious advantages to be gained by suing in the king's court, it is probable that ancient usage would have longer delayed their ascendancy, but for some degree of legal compulsion to sue there, occasioned by the legal maxims and rules already alluded to. And there is every reason to believe that the exercise of this compulsion, and the strenuous assertion by the sovereign of the prerogative of a general control over the administration of justice, and the establishment of a regular judicature, arose chiefly from its being found that fees and amercements would constitute a considerable source of revenue. It is beyond a doubt that the first court was the exchequer. And the sending of itinerant justices,<sup>2</sup> and in the subsequent establish-

<sup>1</sup> Thus a case was removed from the local court where there were only six suitors (*Year-Book, Hen. IV.*). So where the lord of the hundred was interested, as in an assize against the mayor and commonalty of Winton (31 *Assize*, 19); so in a case as to the mayor and corporation of Coventry (*Year-Book*, 15 *Edw. IV.* 18); so if all the inhabitants were tenants of one of the parties (*Year-Book*, 22 *Edw. IV.* 3). In such cases the evil was avoided by removal of the case into the king's court, because then the jury could be accorded to come not from the place in question, nor even from the county at large (in which case some of the inhabitants of the place might be included), but from some other hundred (*Year-Book*, 3 *Hen. VI.* 39; *Trials per Pais*, 109; *Gilbert's Hist. of C. P.*, 68-71; *Comberbatch*, 332; *Dance v. Elliden*, *Cro. Jac.* 650).

<sup>2</sup> There can be no doubt that, in the commissions of these justices, especial care was given to direct their attention to any branches of the revenue, particularly fines and amercements; and so diligently did they attend to this department of their duty that we find the people at last began to dread their approach, and actually desired the periods at which they came might be lengthened (*vide Ang.-Sacr.*, i. 495). This led to the discontinuance of justices itinerant, who went once or twice a year, and the substitution of justices in eyre, who went only once in seven years; but their commissions again directed their attention to the revenue, escheats, fines, forfeitures, &c. That the exchequer was the first superior court is clear, for a contemporary writer, the author of *Dialogus de Scaccario*, says it was established soon after the Conquest, and it is mentioned in the reign of Henry I. (*Madox's Exch.* i. 204), while there is no mention of any other superior court of law except after Magna Charta, when, as common pleas were forbidden from being taken in any court which followed the king, as the exchequer did, the court of common pleas arose at Westminster. Until then, the records show that all suits between party and party which came up to the superior court of the king, came into the exchequer (*Mad. Exch.* 686-793). The judges of that court were called barons of the exchequer, and the other judges who sat there, probably to assist in deciding common pleas, were called "justices of the bench," to distinguish them from the justices itinerant. Fines were taken in the exchequer, and the records removed there about the time of Henry IV. (*Year-Book*, 37 *Hen. IV.* 17).

ment of a superior court for private suits, or common pleas (as they were called), or rather that cognizance of them in the exchequer, which led to such a court, arose from this cause.

For these writs fees were charged,<sup>1</sup> and justice was thus, and in other ways, made a source of royal revenue, which caused it to be made a branch of royal prerogative, and secured it the care and attention of the government, in order to promote and extend that from which revenue was derived. Thus the interest of the crown happily led it to make the administration of justice its special study, and from this at first some abuses, but in the ultimate result many improvements, undoubtedly arose.

From whatever causes, however, the ordinary jurisdiction of the king's courts was upheld to the utmost by legal rules and maxims, and to a great extent, no doubt, it rested upon legal principle.<sup>2</sup> In

<sup>1</sup> "The saurus regis," says Lord Coke, "est pacis vinculo," a truth which all our sovereigns, Saxon or Norman, caught with singular avidity, and grasped with great tenacity. And so soon as they found that justice could be made a source of revenue, they gave every attention to it. Fees were charged for writs, and even fines for expedition; and this is alluded to in the *Mirror* as an "abuse." Moreover, every possible occasion was taken for declaring a suitor be in mercy, as it was called—in *misericordia regis*—for any contempt of court, the effect of which was that he was liable to be amerced, and this was a further source of revenue. This is alluded to in the laws of Henry I, and there is a chapter upon it. There is also a chapter in the *Mirror* on the subject, and one of the clauses of *Magna Charta* was directed against the abuses of amercements. All this, however, tended to give the sovereign an interest in enforcing a regular administration of justice, and in establishing a regular judicature for the purpose. That this was so is shown by this, that the very worst and most rapacious of our Norman sovereigns showed a great regard for the administration of justice. Thus Hale states as to John—"This king endeavoured to bring the law and the pleadings and proceedings thereof to some better order than he found it—for saving his profits, whereof he was very studious—and for the better reduction of it into order and method, we find frequently in the records of his time, fines imposed, *pro stulti, loquio*, that is, mulcts imposed by the court for barbarous pleadings, whence afterwards arose the common fine, *pro pulchre placitando*, which was, indeed, no other than a fine for want of it" (*Hist. Com. Law*, 7). All this was of course illegal; and these were the kind of exactions, no doubt, intended by the article in *Magna Charta*, "Nulli vendemus, nulli negabimus, aut differemus rectum aut justitiam."

<sup>2</sup> So early as the reign of Henry I. the county court was called *curia regis* (*Leges Henrici Primi*, c. xi.), yet counties existed before the earliest times of the Saxons, and the courts of counties arose before there was any united monarchy. "Le leete est le plus ancient cour in le realme" (*Year-Book*, 7 Hen. VI. 12). It was as ancient as hundreds, which undoubtedly existed before the time of the Saxons (whose earliest laws speak of them as already existing), so that it was more ancient than the monarchy itself. So of the courts baron, as ancient as manors, which belong to the time of the Romans. Yet even the leet was said to be the court of the king (*curia regis*), and so of courts in towns and boroughs, which have courts; they are entitled the court of the king (*Year-Book*, 21 Hen. VII. p. 40). Yet the ancient style of the court

pursuance of the same policy, it became firmly established in our courts that all jurisdiction, even in the smallest and most ancient local courts, emanated from the crown, so that even the leet, which was said to be the most ancient court in the realm—and was far more ancient than the monarchy—was said to be the king's court, as part of the justice of the realm.

Under Edward I. the principles which had been established as to the administration of justice were pursued and carried out; the jurisdiction and the judicature of the superior courts of law were settled;<sup>1</sup> with the important addition of a provision for the reservation of questions of law from the circuits for the determination of a superior court; and the consequence was, that the development of law made such rapid progress in his reign that it marks an era in the history of our law.

baron is said by Lord Coke to have been the court of the lord. It also was a necessary consequence of the principle that the crown is charged with the duty of seeing that justice is administered, and that thus allegiance and protection are correlative. Where there is the duty and responsibility, there must be the power. And again, as the crown alone can enforce the execution of the sentences of courts, of necessity their power or jurisdiction must be derived therefrom. And again, as jurisdiction, civil or criminal, is coercive, it is a necessary attribute of the executive power of government, as Guizot points out. Thus Rayneval lays it down that "le pouvoir judiciaire est une emanation du pouvoir executif" (*Droit de la Nature*, c. xii.). Thus our most ancient authorities of law lay it down that all jurisdiction is from the crown. Thus Fleta, "Sine warranto jurisdictionem non habent neque coercionem" (c. xxxiv.). So as the *Mirror of Justice* said, that jurisdiction is the power to declare the law, and that it rests with the king, because he alone can enforce and execute it (c. ii. s. 3). The county courts were in theory the courts of the king, but only in theory; in reality they were mere popular assemblies; practically, a king's judge made a king's court.

<sup>1</sup> Hale says of this king that, "as touching the common administration of justice between party and party, and accommodating of the rules and methods and orders of proceeding, he did the most of any king since William I., and left the same as a fixed and stable rule and order of proceeding, very little differing from that which we now hold and practise, especially as to the substance and principal contexture thereof" (*Hale's Hist. of Com. Law*, c. vii. p. 158). "He established the limits of the court of common pleas, perfectly performing the direction of Magna Charta: 'Quod communia placita non sequuntur curia nostra,' and in express terms extending it to the exchequer. He settled the bounds of inferior courts, of counties, hundreds, and courts baron, which he kept within their proper limits; and so gradually the common justice of the kingdom came to be administered by men knowing in the laws, and conversant in the great courts, and before justices itinerant. He settled a speedier way for recovery of debts, not only for merchants, by the statutes *de mercatoribus*, but for other persons, by granting an execution for a moiety of the lands by *elegit* (*Hist. Com. Law*, p. 160). That is to say, he established a species of recognisances or acknowledgments of debt, under which merchants could obtain summary execution without going through the ordinary formalities of an action; and as to all creditors he gave a remedy against the land of the debtors, which it was thought in these times was the surest way of enforcing or obtaining satisfaction, since in those days, all persons of any substance at all had some property in land.

The result of these improvements in the judicature of the country was, that in the reign of Edward I.,<sup>1</sup> the legal remedies for wrongs and injuries were well settled, and the course of the common law was known and established, so that it was no longer necessary for the great council of the realm to take any part in the administration of justice, which was left to take its regular course in the courts of common law, according to their respective jurisdictions, and subject to the proper correction by appeal.

Hence the reign of Edward I. is a great era or epoch in the history of our law, and hence it resulted that, as in the reign of Edward I., as Hale says,<sup>2</sup> the law received a greater advancement than in all the subsequent periods up to the time at which Hale wrote, long after the reign of Elizabeth, where our author's history closes; inasmuch, indeed, that, in the opinion of that high authority, "the very scheme, mould and model, of our law was then so settled that, in a very great measure, it continued the same in all succeeding ages;" as undoubtedly it did to the end of the reign of Elizabeth, for which reason, doubtless, it was that our author there terminated his history.

When once a regular judicature and regular administration of

<sup>1</sup> "Let any man," says Hale, "look over the rolls of parliament, and the petitions in parliament, of the times of Edward I. to Henry VI., and he will find hundreds of answers of petitions in parliament concerning matters determinable at common law endorsed with answers to this or the like effect: 'Suez vous a le common ley;' 'Sequatur ad communem legem;' 'Mandetur ista petitio in cancellarium, vel iusticiariis de Banco;'" and so parliament refused to review judgments given in courts of law, except in the regular course, in writs of error carried through the courts of error, as to which, it may be observed, that in the reign of Edward III. statutable provision was made.

<sup>2</sup> "The laws did never in any one age receive so great and sudden an advancement; nay, I think it, I may safely say, that all the ages since his time have not done so much in reference to the orderly settling and establishing of the distributive justice of the kingdom as he did within his reign" (*Hist. Com. Law*, c. vii.). "Upon the whole, it appears, that the very scheme, mould and model, of the common law, especially in relation to the administration of common justice between party and party, was highly rectified and set in a much better light and order, by this king, than his predecessors left it to him; so in a very great measure it has continued the same in all succeeding ages to this day. So that the mark or epoch we are to take for the true stating of the law of England as it is, is to be considered, stated, and estimated from what it was when this king left it. But in his time it was in a great degree rude and unpolished in comparison of what it was after his reduction thereof; and on the other side, as it was thus ordered by him, so has it stood hitherto, without any great or considerable alteration, abating some few additions and alterations which succeeding times have made, which for the most part are in the subject-matter of the laws themselves, and not so much in the rules, methods, or ways of its administration" (*Hist. of Com. Law*, c. vii. p. 163).



justice had been established, the law became developed by judicial decisions from the first rude elements of jurisprudence contained in the treatises based upon the Roman law,<sup>1</sup> or judicial decisions made with the aid of principles derived from the same source, and adapted by these decisions to Saxon usages and institutions.

It is remarkable by what slow degrees the most primary and important principles of law were practically carried out and enforced in this country, as, for instance, that fundamental principle which lies at the basis of all civilised justice, the supremacy of law, and the unlawfulness of force or violence for the redress of wrong, or obtaining of right. This great principle, laid down in the Roman law and adopted into the Saxon, was for centuries in a great measure ignored,<sup>2</sup> and it was not until a much later age that it was really carried out.

It is also observable, on the other hand, how, by force of judicial decisions, legal principles derived from the Roman law were carried out and developed into consequences of the most vital character, so as to amount practically almost to alterations of the law, as in the instances of the judicial decisions<sup>3</sup> which virtually converted mere villeins into owners of their lands and tenements.

During the important reign of Edward I., which, above all others,

<sup>1</sup> And so all these elements of law will be found to have been by degrees developed into the more complete form which our law in later ages by degrees assumed. Nor is there any more interesting branch of legal studies than the observation of this gradual process of development. This, indeed, is the great scope of legal history, and in these earlier elementary principles of law are often to be found the only true interpretation of later laws.

<sup>2</sup> Thus in the *Paston Letters* will be seen an account of a regular attack upon a castle in the reign of Edward IV. by a body of armed men, in order to obtain possession of it by force (vol. ii. p. 39, letter 281), and it is most remarkable that even Mr Hallam appears to have considered it lawful. He cites Britton: "The first remedy of the disseisee is to collect a body of his friends (recoiller dueys et force), and to cast out the disseisors;" and though he notices that the statutes of Henry VI. and Richard II. are against it, he says they imply the facts which made them necessary (*Middle Ages*, vol. iii.). But Lord Coke says the statutes were only in affirmation of the common law, and if so, the common law followed the Roman.

<sup>3</sup> It has been seen that in the Roman law, adopted into the Saxon and the Norman, villeins were not to be coerced into services beyond such as were established by custom. This was long afterwards deemed virtually to imply that, so long as they rendered their customary services, they could not be removed. But even in the reign of Henry VI. it was said, as Littleton tells us, that if the lord put them out, they have no other remedy than to sue their lord by petition. But he adds, Brian, chief justice in the reign of Edward IV., said that "his opinion always hath been, and always shall be, that if the tenant, by custom tendering his services, be cast out, he shall have his remedy by action;" and so was the opinion of Chief Justice Danby (*Littleton's Tenures*, c. ix.).

marks a great era in the history of our law, and in which, as Lord Hale observes, the very mould and model of our law and constitution were settled, the influence of the Roman law on the formation of our own is undoubted.<sup>1</sup> But after this reign, probably from the fact that ecclesiastics ceased to be judges, and that the laymen appointed to the judicial office were not sufficiently acquainted with it, its influence in our courts declined, and the result was unquestionably detrimental to the development of our law.

The cause or the result of this disregard of the Roman law was great ignorance in the courts of law,<sup>2</sup> with such extreme narrowness of mind among the judges, that, in consequence of their contracted notions of law, suitors were driven from the courts of law, and forced to find, in an appeal to equity, that full measure of justice which was no longer to be obtained at law.

How scandalously, after discarding the civil law, our courts of law perverted justice,<sup>3</sup> can be shown even from the language of the

<sup>1</sup> As Mr Hallam observes, that wise monarch encouraged its study, and the great treatise of Bracton was based upon it, which Lord Coke regards as the basis of our common law. In the early part of the reign of Edward II., it was said from the bench that the law of England was based upon the civil law. "Que respondez vous," said the chief justice, "a la loy imperial, donques sur quel ley de terre est fondue?" (*Year-Book*, 5 *Edw. II.* fol. 148). In the next reign, however, a serjeant, afterwards chief baron, observed, when the civil law was cited, that he could not understand it (*Year-Book*, 22 *Edw. III.* fol. 37), but Blackstone admits the judge was probably ignorant of it (*Comm.*, vol. i. p. 21), and Mr Phillimore states that Edward I. encouraged the study of the Roman law, and that it was often quoted in the temporal courts here, but that in Edward III.'s time it was quite exploded. Selden, in *Fletam*, c. vii. s. 9, has preserved some curious instances in which it was cited prior to the reign of Edward III., in whose time he says it was "plane neglectus rejectusque," and was unknown to the practitioners in our courts, though still Mr Phillimore thinks it exercised some indirect influence through the ecclesiastical judges or teachers. Mr Phillimore cites with amusing contempt the sneer of "an old savage who was chief baron of the exchequer in the reign of Edward III." against the Roman law. In the reign of Richard II. the commons protested that this realm never had been nor should be governed by the civil law, quite ignorant that all that was worth anything in it was derived from the civil law.

<sup>2</sup> Of this ignorance many illustrations could be given. In the reign of Henry VII. a judge said from the bench that a hundred meant one hundred men, or one hundred vills, or *one hundred parishes!*" (*Year-Book*, 8 *Hen. VII.* fol. 3). No man who had traced the history of our institutions from the Roman times could have fallen into such a blunder. From the *Year-Books* of Edward IV., a passage might be cited in which one of the judges, probably a little less ignorant than the rest, declared that it was entirely through ignorance the suitors were driven into equity (*Year-Book*, 21 *Edw. IV.* fol. 21). It need hardly be stated that in the reign of Henry VIII. the jurisdiction of equity over cases of law was assisted and established by Sir T. More.

<sup>3</sup> Thus it was said in a court of law that "If a man promise to make me a house, and do not, I shall have a remedy in chancery, and that, but for 'mispleading' (i.e., ignorance), there might be a remedy at law" (*Year-Book*, 21 *Edw. IV.* fol. 23). So in

courts of law themselves, who admitted that justice, through their own ignorance, constantly failed at law; that they had come to regard form more than substance; that even in the plainest case justice was too often obstructed or perverted by technical rules,

the plainest possible cases it was constantly said that there was no remedy at law, but that there was in chancery, where the rules of the civil law were followed. Thus, for instance, if a bond was negotiable until actually cancelled in chancery, the party had no remedy against it at law (*Year-Book*, 37 Hen. VI. 13). So again, in that plainest of all possible cases, that of a man who had paid a debt and omitted to take a proper acknowledgment,—it may seem scarcely credible, but it is the fact,—that if the debt were by deed, there was no remedy at law without an acquittance by deed! If a man pay a debt for which he is bound by deed without taking an acquittance by specialty (*i.e.*, by deed), *he shall have a remedy in chancery!* (*Year-Book*, 7 Hen. VII. 11). That is, he was to be made to pay the debt at law twice over, and then sent to commence a suit in chancery to get the money back again! This incredible absurdity was actually vindicated at the time as the perfection of right reason! Thus it was laid down in chancery: Here we adjudge “*secundum veritatem rei*,” and not “*secundum allegata*,” and if a man alleges by bill that the defendant has done a wrong to him, and the other says nothing, if we can see that he has done no wrong, the plaintiff shall recover nothing. “There are,” said the chancellor, “two powers and (kinds of) processes (or procedure): *s. potentia ordinata, et absoluta*. *Ordinata* is as positive law, and has a certain order. *Sed lex naturæ non habet certum ordinem: sed per quemcunque modum veritas sciri poterit*; and therefore it is called absolute procedure; and in the law of nature it is required (*i.e.*, only) that the parties shall be present (or absent by contumacy), and that there shall be an examination of the truth” (*Year-Book of Edw. IV.*, fol. 15; *Bro. Abr. Jurisdiccio*n, 50). Thus it was said in these times: “En le chancery (per le chancellor) home ne sera prejudice la per mispleadinge, ou pur defense de forme, mes secundum veritatem rei, et nous doymus advidger secundum conscientiam, et non secundum allegata, car si homo suppose per byl: que le defense ad fait tout a lui, a que il dit riens, si avomus conusans que il ad fait nul tort a luy, recouera riens; et sont deux powers et proces, silicet potencia ordinata et absoluta, ordinata est come ley positive, come certain ordre, sed lex naturæ non habet certum ordinem, sed per que meumque modum veritas sciri poterit, et ideo dabitur processius absolutus; et in lege nature requiritur que les partis sont presents, ou que ils sont absentes per contumacy, silicet ou ils sont garnie, et font defense et examinatio veritatis” (*Year-Book*, *Bro. Abr. Jurisdiccio*n, 50). Thus, in the *Doctor and Student*, the first question of the doctors of the law of England and conscience is, “that if a man that is bound in an obligation pay the money, but taketh no acquittance, or if he take one, and it happeneth him to lose it, that in that case he shall be compelled by the laws of England to pay the money again!” To which it is answered by the student that “it is *not* the law that a man in such case ought of right to pay the money eftsoons, for that would be against reason and conscience, but that there is a general rule in the law that in an action of debt on an obligation, the defendant shall not discharge himself without an acquittance in writing, which is ordained by the law to avoid a *great inconvenience that else might happen to come to many people*—that is, that every man by mere parol should avoid an obligation; wherefore, to avoid that inconvenience, the law hath ordained that, as the defendant is charged by a writing, he shall be discharged by writing (c. xii.) As if this did not come practically to the same thing! It will be seen how the chancellor sophisticated the law. And if this was the law even of a chancellor, it may be imagined what the common law judges were.

and that suitors were driven to seek in the court of chancery the remedy they could no longer find at law.

A rigid adherence to common law rules, sometimes not supported by any sound legal principle, but the result only of other rules, themselves entirely arbitrary,<sup>1</sup> and resting rather on custom than reason, too often operated to deprive the party of his remedy at law, and remitted him to the delay and vexation of a suit in chancery.

In a later and more learned age, the age of Selden and of Spelman, the study of the civil law was revived, and the result was a great improvement in our law; and some of the most celebrated judgments afterwards delivered in our courts of law were derived from the principles of the Roman law.<sup>2</sup> Nor can there be any

<sup>1</sup> Take, for instance, the rules as to tenants in common, or copartners. As long ago as the reign of Henry I. they had remedy at law, for in the *Leges Henrici Primi*, founded on the civil law, we find a section (54): "De discessione sociorum civis pecuniæ," we read, "Si ab qui fuerint ita socii, ut pecuniam suam posuerint in commune, et a societate et communitate illa discedere voluerint, afferant coram testibus quicquid habent in commune dividendum, ut si opus est super sancta jurent, quod amplius non habeant, et adquisicionem et adquisitum, sicut rectum est et pactum fecerunt, dividant inter se." This shows that no difficulty could have been made at that time about any case of joint or common property, even when it was a matter of adjustment and settlement, much less when it was a question of ouster of one of the common owners by the other. But in the reign of Henry VI. it was otherwise at law. Thus *Littleton*, s. 322, and *Co. Litt.*, 323: "Albeit one tenant in common takes the whole profits, the other hath no remedy by law against him, for the taking of the whole profits is no ejectment; but if he drive out of the land any of the cattle of the other tenant in common, or do not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have an ejectment for the moiety, and recover damages for the entry, but not for the mesne profits. And thus one tenant in common could not have an action of trespass against the other. (*Bro. Abr.*, "Tenants in Common," pl. 14; *S. P.*, *Haywood v. Danes*, Salk. 4), nor account, even though the other was his bailiff (*Year-Book*, 17 Ed. II. 552). So a tenant in common could not be a disseisor without an actual "ouster" of his companion (*Goodtille*, 2; *Points*, 3; *Wilson*, 118; *Ibid.* 391). So *Litt.*, s. 323: "If two be possessed of chattels personal in common, and one take the whole to himself out of the possession of the other, the other has no remedy but to take this from him who hath done the wrong, to occupy in common, *when he can see his time*." So *Coke Litt.*, 200, a: "If one tenant in common takes all the chattels personal, the other has no remedy by action, *but he may take them again*." So *Brown v. Hedges*, 1 Salk. 290; *Fox v. Hanbury*, *Cowp.* 448.

<sup>2</sup> For example, the celebrated judgment of Holt in the great case which settled the law of bailments, the case of *Coggs v. Bernard* (1 *Lord Raymond's Rep.* 709), which Mr Hargreave called a most masterly view of the law of bailment (*Co. Litt.* 896, n. 3). Sir W. Jones, in his *Treatise on Bailments*, observed that it was in a great degree based on Bracton, who was derived from Justinian, and the judgment certainly is based entirely on the civil law. A very learned writer of our own time says that equity formed an ingredient in the Roman law, and was thence infused in some degree into the common law (*Spence's Eq. Jur.*, 411).

As a matter of fact there can be no doubt that these are the most remarkable

doubt that large portions of our law can be traced to that source, to be found in the Saxon laws, and were afterwards developed into a complicated system of rights and remedies as to real property, which, having reached to so great a pitch of refinement, was only swept away by a statute passed in our own times.

In the civil as in the criminal branch of our law, there are entire heads of law, peculiar in their character and in their terms, which have been in our law from the very earliest times, and which by their very terms are obviously derived from the Roman law.<sup>1</sup>

Some of the processes of our law, which we suppose to be most resemblance between the Roman and the common law, upon a great variety of most important subjects. As to the rules of descent of real property, they were substantially the same, until the common law was altered as to real estates by the feudal system, and the custom of primogeniture, introduced, no doubt, with reference thereto. And the Roman rule was retained in substance as to personality, and restored by the statute of distributions. Then as to lineal descent, the Roman law provided certain precautions to prevent frauds upon the real heirs, by frauds of widows pretending to be with child (*Pandects*, lib. xxv., tit. 4), and hence our common law writ, *De ventre inspiciendo*. Again, the Roman law as to services and servile tenures, and as to servitudes, formed the basis of our own law of manors and copyholds, and our whole law of easements. So as to the Roman law of limitation or prescription, which was always recognised by our law, though fully established by old statutes. The principle of the common law, on which the statutes of limitation were founded, was the presumption in favour of possession, which is derived from the Roman law (*Pand.*, lib. xliii., tit. 17). And this principle in Roman litigation, as in our own, threw the onus on the claimant until he had established his right, when the possessor had to show a better title.

Then there is the remarkable law of Ethelred. "He who sits without contest or claim on his property during life, let no one have an action against his heirs after his day," (s. 14). "Where the husband dwelt without claim or contest, let the wife and children dwell unassailed by litigation; but if the husband before he was dead, then let the heirs answer, as he himself should have done if he had lived" (*Canute*, c. lxxiii.), which was enacted in a law under Canute, and was retained in our law under the title of right of entry "toll'd," or taken away by descent, or a continual claim, until it was abolished by the Real Property Act, 3 & 4 William IV., cap. 27. So in a law of Canute as to the effect of a judgment as to the right to land, we find the origin of the use of recoveries, which afterwards prevailed until that act. "He who has defended land (*i.e.* against all claim) with the witness of the shire (*i.e.* in the county court, the only court at that time), let him have it undisputed during his day, and after his day to sell and to give" (*Laws of Canute*, c. lxxx.). So of fines.

<sup>1</sup> Thus, for instance, the whole law as to gifts or donations, especially that peculiar one of *Donatio mortis causa* (*Cod. Just.*, lib. viii., tit. 56). So as to distress (*Cod. Just.*, lib. viii., tit. 27, "*De districtione pignorum*;" and lib. x., tit. 30, "*De capiendis et distrahendis pignoribus tributorum causa*;" lib. x., tit. 21, s. 1, "*Res eorum que fiscalibus debitis per contumaciam satisfacere diffecerit, distrahantur*." The application of the process to the levying of rent or service was easy and natural. So to the precaution provided by the Roman law against frauds by widows upon heirs, and the writ, *De ventre inspiciendo*, which was derived from the Roman law into our own (*Pand.*, lib. xxv., tit. 4, *De inspiciendo ventre*). Savigny gives several instances of citations from the Roman law in the Saxon (vol. iii. p. 168.)

entirely the inventions of our common lawyers, will be found to bear such a remarkable resemblance to Roman usages as to justify the persuasion that those usages suggested them.<sup>1</sup>

The main importance, however, of the study of the Roman law, with reference to its influence on the formation of our own, is in this, that it was the great fountain of legal principle, whence all of our law that was not barbarous (and which, therefore, for the most part has disappeared) was derived. And it might have been imagined that writers upon our legal history would have directed attention to this source and fountain, whence were derived the principles from which our own was developed.

This, however, has not been the case, and the only writers on our legal history, Hale, Blackstone, and our author, have either ignored the influence of the Roman law upon the formation of our own, or have, at all events, made no attempt to trace and to describe it, because they found it difficult to trace particular pieces or portions of our law to that source.

It surely must be manifest that this view is narrow and inconsistent,—narrow, because it restricts the use and scope of legal history to a mere process of precise identification of particular laws; and inconsistent, because if this were all, the study of legal history would, on the narrow practical view suggested, be of little use or value. If legal history is to be looked at only with a view to the actual law as it is, its scope is limited indeed; but in the view of the greatest writers, it has a far wider and larger scope—it teaches the principles from which laws are derived, and the processes by which they are developed; it gives the mind the best possible training, either for law or legislation, and the best possible preparative for the study either of history or law. “Il faut,” said Montesquieu, “éclairer les lois par l’histoire, et l’histoire, par les lois.” And if the history of law leads to the Roman law as the true source and standard of law, then the mind is directed to the study of that which is the highest human law, and the key to all human history.

<sup>1</sup> The action of ejectment for instance. In the Roman law there was this usage. If the thing was immovable, there appears to have been an old ceremony of the parties going to the land, and one expelling the other from it and leading him before a magistrate (*Sandar’s Introd. to the Institutes*, p. 59). Now no one can fail to be struck with the resemblance here presented to the original procedure in ejectment, the lease, and the expulsion which used to form the foundation of the action. So as to fines, learned authors are of opinion that they originated in a suggestion derived from a proceeding in the Roman law (*Cruise’s Essay on Real Property*), and there is great foundation for the belief.

Since Hale wrote and since Reeve wrote, a far wider view than theirs has been taken of legal history. That great writer, Guizot—who has, perhaps, more than either, elicited the philosophy of legal history—thus expounded its nature and advantages: “Between the development of legislation and that of society, there is an intimate correspondence; the same revolutions are accomplished therein, and in an analagous order. Let us study the history of laws during the same epoch, and let us see if they will lead us to the same result—if we shall see the same explanation arise from it. The history of laws is more difficult to understand thoroughly than that of events properly so called. Laws, from their very nature, are monuments more incomplete, less explicit, and consequently more obscure. Besides, nothing is more difficult, and yet more indispensable, than to take fast hold of and never lose the chronological thread. When we give an account of external facts, wars, invasions, &c., then chronological concatenation is simple and palpable; each event bears, as it were, its date upon its face. The actual date of laws is often correctly known, it is often known at what epoch they were decreed; but the facts which they were designed to regulate, the causes which made them to be written in one year rather than another, the necessities and social revolutions to which the legislation corresponds, this is what is almost always unknown, at least not understood, and which it is still necessary to unfold, step by step. It is from this study having been neglected, from the not having rigorously observed the chronological progress of laws in their relation to that of society, that confusion and falsehood have so often been thrown into their history. A little more attention to the chronological development of laws and of the social state would have prevented it” (*Lettres sur la Civiliz. dans France*, lect. xxv.).

It would be impossible to express more clearly or more correctly the objects, the uses, and advantages of legal history, or the history of law, and the necessity for tracing it from its earliest rise, and in every step of its course and progress.

And the same great writer, Guizot, forcibly expounded the importance of the study of the Roman laws and institutions, as a preparation for the study of those of the races they subdued. He says—“In commencing, in any quarter of Europe, the study of modern civilisation, we must first investigate the state of Roman society there, at the moment when the Roman empire fell—that is

to say, about the close of the fourth to the opening of the fifth century,"<sup>1</sup> (*Lectures sur la Civilization dans France*).

The grand feature in the character of the Roman law was its universality. This may here well be described in the eloquent language of one of the most eminent and enthusiastic of its teachers, the gifted author already alluded to:—"In consequence of the increasing power of the republic, new magistrates became necessary. Among these, one was created of the utmost importance in the history of Roman legislation; this was the *Prætor peregrinus*, *qui inter cives et peregrinos jus dixit*. The function of this magistrate was to adjust the disputes which might arise between citizens and foreigners. Thus a new element found its way into Roman jurisprudence. In addition to the local and positive laws by which their own society was regulated, it became necessary for the Roman judge to consider the fundamental principles of justice, from which all law derives its obligation. These principles, under the name of *jus gentium*, thus became familiar to the minds of Roman jurists, and exercised a considerable and happy influence over the institutions of Rome itself. Thus it was, that the view of the jurist became more liberal and extensive, and the notion of a law not dependent upon climate or on caste, common to man on the banks of the Ilissus, the Tiber, or the Euphrates—a covenant, as it were, between earth and heaven, which no human authority could abrogate or supersede, from which all laws derived their controlling power—was transferred from the schools of Greece to the tribunals of Rome. It became every day more and more necessary to appeal to broader principles than those which the municipal institutions of any country could supply; and these were to be found only in the *naturalis ratio*, the principles implanted in the man wherever he lived, and however he was governed" (*Phillimore's Study of the Roman Law*, p. 80). It must be manifest that a law pervaded by

<sup>1</sup> The eminent writer goes on to say: "This investigation is peculiarly necessary in the case of France. The whole of Gaul was subject to the empire and its civilisation; more especially in its southern portions was thoroughly Roman. In the histories of England and Germany Rome occupies a less prominent position; the civilisation of those countries in its origin was not Roman but Germanic. It was not until a later period of their career that they really underwent the influence of the laws, the ideas, the traditions of Rome" (*Lect. sur la Civiliz. dans France*, Lect. ii.) It will have been seen, however, that this was a mistake, and that he had forgotten his own contemptuous allusion to Saxon sources of civilisation; when the course of those influences is traced, it will be found to have commenced much earlier than this eminent writer supposes.



such grand views and such broad principles as these, must have been singularly adapted to exercise a salutary influence upon the barbarian races reduced under its rule; and that this influence must have endured even after the power of the empire was withdrawn, by the force of moral suasion, which never fails to draw men to imitate what they admire or revere. Hence we might expect to find the barbarian races—for instance, our own Britons or Saxons—so soon as the influence of Roman civilisation began to tell upon them, look up to, and lay hold of, the laws and institutions of the mighty empire, whose greatness they could not but recognise even in the age of its decline. The main interest of the question as to the connexion between the Roman law and our own, is, that our vast empire, over numerous races and peoples, occupies a position in the world very analogous to that of Rome, and in which a like necessity exists for recourse to principles of jurisprudence, wide and broad enough to embrace all the numerous nations subject to our sway, and enable us to rule and govern them all upon the broad ground of common principles of justice, equally applicable to them all. This was the glory of the Roman law, and for that very reason does enter largely into our own law, and that of many of the colonies or countries subject to our rule; and it is manifest that the more the attention of English lawyers is called to it, the more enlightened and enlarged will be their views of law and legislation, and the more free from the narrow bonds of mere municipal law and national prejudice.

This is undoubtedly the view taken by the ablest writers. A learned and able writer in our own time says—"It is scarcely possible to suppose any well-read lawyer, captivated as he may be with the notion of Saxon liberty, can proceed far in the study of either system, without perceiving a striking analogy between the civil law of Rome and the common law of England, not only as to their maxims and principles, and their technical phraseology, but also their method of practice, showing how early, and to what extent one system became the instructor and guide of the other. To some minds there is a black-letter witchcraft in the expressions, 'Anglo-Saxon liberty,' 'ancient constitution,' and the like, while the chances are, that in furnishing an example they may fall into the whimsical position of seizing upon some relique of Roman jurisprudence to prove the perfection and justice of their own" (*Goldsmith's Doctrine of Equity*, p. 8).

“When we remember that the Romans held possession of this island nearly five hundred years, and during that period some of the most celebrated lawyers administered justice among the conquered Britons upon the like footing, and according to the same system adopted by the conquerors in their own country, we cannot be surprised that such an event had its due influence in stamping a character upon the future institutions of the country, more especially as the Romans also imposed their language as well as their customs upon the newly-acquired colony” (*Goldsmith's Doctrine of Equity*, p. 8).

No one can have followed the imperfect review which has here been presented of the course of our legal history without feeling that this is perfectly true. The same view has the authority of the great writer—the historian of *Europe in the Middle Ages*—who has left on record his opinion that the influence of the Roman law upon those who framed our own was greater than they acknowledged, or even than they knew, and he added: “A full view of the subject is still, I think, a *desideratum* in the history of the English law, which it would illustrate in a very interesting manner” (*Middle Ages*, c. viii.) It has been the endeavour of the writer, in some degree, to supply this deficiency, and at all events he has now explained the views and principles upon which the present edition has been prepared. Nor is the interest of all this merely historical, nor has it only a reference to the past. The subject has a nearer interest on this account, that within the numerous dominions or dependencies of our vast empire there are always some communities which are in a state similar to that of our own country, at some one or other of its different conditions, and are passing through periods of transition, and undergoing changes, which this country went through in ages past. Thus, for instance, in the vast dominion of India, in itself an empire, there have always been provinces which have exemplified, under some species of rule, the various states or conditions through which this country passed in early times; whether the elaborate despotism of the Roman period of occupation, the rude barbaric freedom of the Saxon popular tribunals, or the feudal system of the Normans; all these, as described by the pen of a Gibbon, or a Guizot, or a Palgrave, in our own or other countries of Europe during the earlier or middle ages of European history, will be found to have been reproduced upon the continent of India, either under native rule or under our own.

Thus the first state or condition in which we find the people of India under their Hindoo emperors, that of unmitigated despotism, so closely resembles that in which the various races of Europe were in the later period of the Roman empire, that the passages in Gibbon or in Mill which describe them, respectively appear like remarkable historical parallels.

<sup>1</sup> In Mill's *Hist. Brit. India*, vol. i. c. iv., a very similar account is given of Hindoo judicature : "As kings and their great deputies exercised the principal functions of judicature, they were too powerful to be restrained by a regard to what had been done before them by others. What judicature could pronounce, therefore, was almost always uncertain, almost always arbitrary" (p. 171). And again, in a note, "The authority of the Hindoo princes, as well as that of the vile emissaries whom they keep in the several provinces of their country, being altogether despotic, and knowing no other will but their own arbitrary will, there is nothing in India that resembles a court of justice. The civil power and judicial are generally united and exercised in each district by the collector or receiver of the imposts. This tribunal, chiefly intended for the collection of taxes, takes cognisance of all affairs, civil or criminal, within its bounds, and determines on all causes." This was just the state of the Saxon and early Norman system, when the shire-reeve, the sheriff, the king's steward, or bailiff, originally appointed mainly to receive his dues, was also the chief judge of the county. The sheriff was ultimately deprived of all real *judicial* power, and made the mere minister of the law. And the judicial powers of the 'collector system' of magistracy in India is not approved of by the best authorities. The 'collector' commonly exercised both civil and criminal jurisdiction within the territory over which he was appointed to preside. In his criminal court he inflicted all sorts of penalties. . . . In his Adawlut or civil court, he decided all questions relating to property. His discretion was guided or restrained by no law, except the commentaries and customs, all in the highest degree loose and indeterminate. There was no formed and regular course of appeal from the Zemindary decisions, but the government interfered in an *arbitrary* manner. . . . To the mass of the people these courts afford but little protection. The expense created by distance precluded the greater number from so much as application for justice. The judges were swayed by their hopes or their fears, their proceedings were not *controlled by any written memorial or record*. Originally questions of revenue, as well as others, belonged to the courts of the Zemindars; but a few years previous to the transfer of the revenues to the English, the decision of fiscal questions had been taken from the Zemindars, and given to an officer called the fiscal-deputy in each province" (*Mill's Hist. British India*, vol. i. b. v. c. i. p. 314, *quart. ed.*) "One of the first steps in reform was to establish supreme courts of appeal; and, of course, as a necessary condition, it was ordained that *records* of all proceedings should be made and preserved" (*Ibid.* p. 316). The Zemindars, it is elsewhere stated, had an office and authority, comprising both an estate and a magistracy, a species of sovereignty (*Ibid.* c. iii.) As kings and their *great deputies* exercised the principal functions of judicature, what judicature would pronounce was uncertain and almost always arbitrary (vol. i. c. iv. p. 2). "For a considerable time before the establishment of British supremacy, the people of India had been unaccustomed to any regularly *organised and administered* system of law or justice. . . . The main principle that everywhere regulated the administration was the *concentration of absolute authority*, and the same individual was charged with the superintendence of revenue, justice, and police; with little to guide or restrain him, except his own perceptions and sentiments of equity. Even in the best of times the sovereign was the fountain of law and justice, . . . but the leading object of the native governments was the realisation of the largest possible amount

In India, from very early times, there had existed a system of natural arbitration by the neighbours, which probably formed in every country the first attempt at anything like an administration of justice, and which substantially resembled our old Saxon county courts, being mere assemblies of the principal inhabitants, who took cognisance of the disputes which arose among them, and made the best settlements they could—a system suited to an early state of society, and which necessarily precedes a more regular administration of justice.<sup>1</sup>

Such a system was only suited to the rude and simple condition of society in which it had originally arisen; and hence, when it was attempted half a century ago to restore it in India, the experiment failed,<sup>2</sup> for reasons which might have been anticipated by the of revenue, and all persons engaged in this duty were armed with plenary powers, both as magistrates and judges; so that, in general, the people were left to the uncontrolled will of individuals" (*Mill's Hist. Brit. India, cont. by Wilson*, vol. i. 387).

<sup>1</sup> In the absence of courts of justice provided by the state, the people learned to abstain from litigation (*Elphinstone*, iv. 194); or "when disputes arose among them, submitted them to the abitrament of judges chosen among themselves. This expedient had probably descended from ancient times, in what had been a recognised element of Hindoo judiciary administration, under the name of Panchayat," [this is a mistake, for in the next page the historian mentions "the Panchayat had no power to enforce its decrees, so it was not a judiciary body;"] but it had fallen into discredit in most parts of India." Although, he adds, they were not inaccessible to personal bias or corruption, and their proceedings were occasionally irregular and tedious, yet they were suited to the times, and congenial to the feelings of the people, and supplied the place of better organised and more solemn tribunals (*Hist. Brit. India*, vol. i. 389). He says, in a note, they seem to have been but clumsy instruments. He elsewhere says they were prized only so long as nothing better was to be had.

<sup>2</sup> The effects of the regulations, (extending the system of village Panchayats) operated to lighten the duties of the judges, and to facilitate the determination of civil suits. Some of their results, however, were unexpected, and afforded an unanswerable proof that the sentiments of the natives of India are as liable as those of other natives to vary with change of time and circumstances. The benefits so confidently anticipated from the public recognition of the Panchayat, were not realised: the supposed boon to the people was rejected; they would make little use of an institution interwoven, it had been imagined, inseparably with their habits and affections. The Panchayats, it appeared, had been highly prized, only *as long as nothing better was to be had*. In the absence of all other tribunals, the people were constrained to establish one for themselves, and willingly admitted its adjudication of disputes which there was no other authority to settle; while, on the other hand, the most respectable members of the community, especially interested in maintaining property and peace inviolate, and being subject to no authoritative interference or protection, willingly discharged, without any other consideration than the influence which they derived from their discharge of such functions, the duties of arbitrators and judges. But a court, the members of which had no responsibility, &c. (*Wilson's Hist. Brit. India*, vol. ii. p. 321). As the patels or head men of the villages, and the village Panchayats, were not to receive any remuneration for the performance of

aid of the light to be acquired from our own legal history. It was found, as indeed had been predicted, that the ancient system of rude popular arbitration had only been tolerated when nothing better was known, and because nothing better was known; and that when once the idea of a rational and intelligent administration of justice by any judicial order of men had arisen, the preventive system of natural arbitration would not be endured.

And although some writers in our own times<sup>1</sup> have been disposed to admire what they called the "simple and natural" pro-

the duties to be assigned to them, it was anticipated that they would either decline the obligation, or fulfil it with reluctance and indifference. Connected also as they must be with the parties concerned in the cases before them, it was scarcely to be expected that they should perform their duties free from bias or partiality; and as it was part of the plan that their sentences should not be subject to appeal, there was no security against their committing gross injustice. As also they were necessarily ignorant of the laws and regulations, their judgments could not be governed by any determinate principles, and their decisions could not fail to be capricious and contradictory (*Wilson's Hist. Brit. India*, vol. ii. p. 518). Notwithstanding, however, these objections, the system was established in 1816—with what result? "The benefits expected were not realised; the Panchayats, it appeared, had been highly prized, *only as long as nothing better was to be had.*" "In the gross and complicated mass of human passions and concerns, the primitive rights of men undergo such a variety of refractions and reflections, that it becomes absurd to talk of them as if they continued in the simplicity of their original direction. The nature of man is intricate; the objects of society are of the greatest possible complexity; and therefore no simple disposition or direction of power can be suitable either to man's nature or to the quality of his affairs. When I hear the simplicity of contrivance aimed at and boasted of in any new political constitution, I am at no loss to decide that the artificers are grossly ignorant of their trade. The simple governments are fundamentally defective. If you were to contemplate society in but one point of view, all these simple modes of polity are infinitely captivating. In effect, each would answer its single end more perfectly than the more complex is able to attain all its complex purposes. But it is better that the whole should be imperfectly answered than that while some parts are provided for with great exactness, others might be totally neglected or materially injured. The advantages of government are often "balances between differences of good, compromises sometimes between good and evil, and sometimes between evil and evil" (*Burke's Reflections upon the French Revolution*).

<sup>1</sup> Mr Mill, while arguing against the uncertainty of unwritten laws, admits that this uncertainty is limited by the writing down of decisions, "when, on any particular subject, a number of judges have all, with public approbation, decided in one way; and when these decisions are recorded and made known, the judge who comes after has strong motives not to depart from their example. This advantage, the Hindoo judicial system," he observes, "was deprived of, in this respect resembling our old Saxon system." Among them, the strength of the human mind has never been sufficient to recommend effectually the preservation by writing of the ceremony of judicial decision. It has never been sufficient to create such a public regard for uniformity as to constitute a material motive to a judge. And as kings and their great deputies exercised the principal functions of judicature, they were too powerful to be restrained by a regard to what others had done before them. What the judicature

ceedings of these popular tribunals in India, they have been compelled to admit, in a great degree, their evils, especially in the absence of anything like certainty or uniformity in the administration of the law; and it has been manifest from the tenor of their observations, that the view they had taken was comparative with reference to a system of procedure then established in this country, which was infinitely too formal and artificial, and led many to suppose that a system could not have forms without being formal, could not be regular without being technical. And these writers have admitted the advantages of a regular judicature, and a regular system of procedure, with its records and appeals, and its guarantees against error or uncertainty in law.

But when an order of judges were appointed, however inferior, yet acting in the regular discharge of a judicial duty under the authority of government, and under some sense of responsibility, the great superiority of this approach to a regular judicature, and a settled system of administration of justice, was so apparent to the people, that their ancient native tribunals were soon deserted, and the new order of judges, notwithstanding all their imperfections, were appealed to in preference.<sup>1</sup>

The interest and the importance of the study of our legal history may be enhanced and illustrated by some further considerations. would pronounce, was therefore almost always uncertain, almost always arbitrary (*Mill's Hist. Brit. India*, b. ii. c. 4). It would surely be impossible to imagine a greater fallacy. Mr Mills approved of the Hindoo and Mohammedan systems of procedure because, he says, they were so "simple and natural," merely summoning the parties, and making a direct and simple investigation. This system may do well enough for simple cases, and, as shown in the text, it has always been allowed in our law for such cases, with the advantage, however, of a central system of control in the superior courts to prevent excess or abuse of jurisdiction (p. 171, and p. 6, c. i., vol. i.) Under the Hindoo and Mohammedan systems, however, it seems to have been applied to all cases, and without control or appeal; and Mr Mills admits that it made no provision for securing uniformity: "no provision made for the preservation by writing of judicial decisions; no regard for uniformity" (p. 171); "so that what judicature would pronounce was almost always uncertain and arbitrary" (*Ibid.*) And he admits "that the Indian system of procedure is liable to the evil of the arbitrary power with which it entrusts the judge" (p. 141, 1st ed.) His only defence for it is, that a regular—as he calls it—technical system could not avoid the same evil. But a regular system need not be technical; and may, as ours does, regard only what is substantial, and may be sufficient to guard against the evils he points out. It is due to him to add that our system of procedure has been greatly altered since he wrote; not, indeed, in its principles, but in its forms, which were infinitely too strict and technical.

<sup>1</sup> "But a court, the members of which acknowledged no responsibility, and performed their functions only for such a term or at such times as suited their own convenience; who were guided by no light except their own good sense; and who, even if incorrupt, could scarcely be impartial; who had no power to carry their own decrees

In the numerous dominions and dependencies within the compass of our vast empire, while, on the one hand, our own law is, more or less prevalent in the greater portion of them, yet, on the other hand, there are many of them in which other systems of law are more or less prevalent; but most of these derived, like our own, from the Roman or civil law. It is manifest that to the subjects of such an empire, in whatever portion of its dominions they may live, the study of her legal history must be of great interest and advantage, whether as being itself the law under which they live, or as derived from the same law which was the parent of their own, and which was based on great principles, capable of application in every civilised community.

There is probably no empire in which the law is more honoured than in our own. In this respect, again, the British empire resembles the Roman. A semi-barbarous people pay more regard to arms than to morals, to commerce, or to law. Thus, in Russia at this day, commerce, the law, and all civil employments, are held in no esteem (Sir A. Alison's *Hist. Europe*, vol. ii. p. 391). So the same writer says, "Nothing astonishes the Russian or Polish noblemen so much as seeing the estimation in which the civil professions, and especially the bar, are held in Great Britain" (*Hist. Europe*, vol. x. p. 566). As the Roman empire extended the study of the Roman law through its provinces, so it has been with our own; and nowhere is law more regarded than in our colonies. Thus very early in the history of our American colonies, their respect for law was remarkable. Burke was struck by it. "In no country perhaps in the world is the law so general a study" (*Burke's Works*, vol. i. p. 188). Mr Buckle cites this remarkable testimony, and adduces more modern works to establish the same characteristic. (See Lyell's *Second Visit to the United States*, vol. i. p. 48; and Combe's *North America*, vol. ii. p. 329). It is obvious that in such countries and colonies the study of our legal history must have a great interest.

into effect, and whose sentences were liable to no revision; such a court must have been a very inadequate substitute for any tribunal, the proceedings of which were regulated by fixed rules, removed from personal influence, and subject to vigilant supervision. Whatever defects might still adhere to the administration of justice through individual judges, native or European, appointed by the government, *their courts continued to be crowded, while the Panchayats were deserted, &c.* . . . The patels were mostly ignorant men, little qualified by superiority of knowledge or talent to command respect for their decisions. Recourse was rarely had to their judgments, and the chief labour fell upon the *officers appointed by the state for the distribution of justice among the people*" (*Wilson's Hist. Brit. India*, vol. ii. p. 522).

There are, it will have been observed, many uses or objects of legal history, which, however, perhaps may be included under the two great heads mentioned by Montesquieu: the illustration of history by law, or of law by history. The former belongs rather to the general student, to the politician, the jurist, the legislator, or the statesman. The latter alone belongs specially to the lawyer.

It has been well said by an eminent luminary of the law that no man can be a good lawyer who is not well acquainted with the *history* of law. The reason is obvious enough, upon reflection, for to be a lawyer, and, still more, to be a jurist, demands a thorough acquaintance with the principles of law,<sup>1</sup> and these can only be acquired by tracing them, so to speak, to their real source and origin, an inquiry which belongs to legal history. The principles of every part of our law are to be found in their simple, original forms, in its more ancient forms and proceedings; and though these may long ago have become obsolete, the principles endure, for, as a learned judge once observed to the writer, forms may perish, but principles remain, and they only reappear in new forms more suited to the manners and exigencies of the age.<sup>2</sup>

Thus the old writs or proceedings of our law embodied the principles and objects which are now worked out by more modern procedure.<sup>3</sup> The ancient tribunals of the country are superseded by other institutions directed to the attainment of the same object, and not only the vast domain of common law, but still more complicated systems, like our systems of conveyancing or of equity, are to be deduced from simple elements to be found in the Year-Books.

<sup>1</sup> There is a passage in our author to this effect (*vide* vol. iii. c. xxxv.), *et vide* p. 497.

<sup>2</sup> For instance, advertisement in the papers now takes practically the place of proclamations in the ancient county court, or assemblies of the people.

<sup>3</sup> Thus the old writ of *ad quod damnum* was superseded, as to the stoppage or diversion of highways, &c., by the Highway Act, 13 Geo. III. (*Ex parte Armitage Ambler*, 294; *Dairson v. Gill* (East); *Rex v. Netherthong*, 2; *B. and Ald.*, 179). The whole statute law as to the liability of the hundred for damage done by rioters (going back to 1 & 6 Geo. I., and the 27 Eliz. c. xiii.) is based on the common law liability, founded on customs derived from the ancient Saxon laws (*Rex v. Clark*, 7 T. R. 496). An action on the case was held maintainable upon the 6 Geo. I. c. xvi. s. 1, by the party grieved, to recover damages against the inhabitants of the adjoining township, for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown, though the clause directed the party grieved to recover his damages in the same manner and form as given by the stat. 13 Edw. I. st. 1, c. xlv., for dykes and hedges overthrown by persons in the night, upon which the usual course of proceeding had been by the writ of noctantur (*Thornhill v. Huddersfield*, 11 East, 349). So as to the statute of *Hue and Cry* as to robbery (*Whitworth v. Grimshaw*, 2 Wils. 105; *Rex v. Halfshire*, 5 T. R. 341). These are only instances.



It is laid down by all great writers that the only way to become a lawyer is to study the more ancient authorities of our law, and it is often otherwise impossible to master the law on a subject;<sup>1</sup> yet it is as impossible, without an acquaintance with the history of the law, to understand them, for the very reason that the forms and proceedings they mention have long been obsolete, and yet without understanding them, the statutes and the reports are unintelligible, and the sources of the principles on which the law rests are sealed and inaccessible. No part of our law can be thoroughly understood without tracing back that tradition to its origin and source. But to do so it is necessary to have the guidance afforded by legal history.

On the other hand, as one who was both a lawyer and an historian,<sup>2</sup> and himself well understood and applied the mutual illustration of law and history, observed, law as often illustrates history, as history elucidates law.

These, therefore, are the uses and objects of legal history, and those the ideas and views upon which this history has been edited.

<sup>1</sup> Even although they have for ages been obsolete. Thus, for instance, on the important subject of bail in criminal cases, Lord Coke is careful and copious in expounding the enactment in the first statute of Westminster, although the writ founded thereon was, as he mentions, taken away by the subsequent act, 28 Edw. III., because (he says) "the statute of Philip and Mary concerning bail has relation to our act" (2 *Inst.* 190). So he cites the *Mirror*, Bracton, and Britton constantly and copiously to explain our older statutes, and he frequently speaks strongly as to the necessity for a knowledge of the history of law. For instance, he says: "It is necessary not only to know the law, but also the root and reason out of which the law deriveth his life—viz., whether from the common law or from some act of parliament, lest, if he taketh it to spring from the common law, it may lead him into error" (2 *Inst.* 296). So in another place he says, "And though this act (of 18 Edward I.) be repealed, yet it may serve in many respects to explain the statutes of 4 Henry VII., and 32 Henry VIII., for the true understanding of the common law, and of former statutes, is the sure master-expositor of the later" (2 *Inst.* 518). But it is manifest that the very language and terms of the Year-Books or old statutes cannot be understood without an acquaintance with legal history. No man who has not read Britton can well understand the Year-Books; and to master the law, it is necessary to refer to the Year-Books, and often to the Roman law. Thus the liability of innkeepers and carriers can be traced back through the Year-Books (42 *Edward III.*, fol. 11; 11 *Henry IV.*, fol. 45) to the civil law (*Dig.*, lib. iv. tit. 9, leg. 3, s. 2), whence, no doubt, it was derived, by custom, into our own.

<sup>2</sup> Lord Bacon, who says—"It is a defect even in the best writers of history, that they do not often enough summarily set down the most memorable laws that passed in the times whereof they write, being indeed the principal acts of peace. For, though they may be had in the original books of laws themselves, yet that informeth not the judgment of king's counsellors and persons of estate so well as to see them described and entered in the title and portrait of the times" (*Life of Henry VII.*, p. 46).

# HISTORY OF THE ENGLISH LAW.

## THE SAXONS.

*The Laws of the Saxons—Thainland and Reveland—Freemen—Slaves—The Tourn—County Court—Other inferior Courts—The Wittenagemote—Nature of Landed Property—Method of Conveyance—Decennaries—Criminal Law—Were—Murder—Larceny—Deadly Feuds—Sanctuary—Ordeal—Trials in Civil Suits—Alfred's Dom-boc—Compilation made by Edward the Confessor—Saxon Laws.*

THE law of England is constituted of Acts of Parliament and the custom of the realm (*a*) ; on both which courts of justice exercise their judgment ; giving construction and effect to the former, and, by their interpretation, declaring what is and what is not the latter.

We possess many of these Acts of Parliament from Magna Charta, 9 Henry III., to the time of Edward III., and from thence in a regular series to the present time. The statutes, except some very few, enacted by the legislature before that period, are lost ; though, no doubt, many of the regulations made by them, having blended themselves with the custom of the realm, have been received under that denomination, since the evidence of their parliamentary origin is destroyed (*b*). The custom of the realm, or

(*a*) This, it will be observed, is a definition rather of law, or of the “formal grounds or constituents,” as Lord Hale calls them, of the law, than of legal history. And it omits what he includes among them, judicial decisions (*c*. 4), which he says are incorporated into the law (*c*. 1), together with the materials on which they proceeded, which are often lost to us, whether it be ancient statutes or usage. And as to this he points out that the canon or civil law has been, by immemorial usage, in some matters adopted into our own (*c*. 2). And, elsewhere, he also points out that these judicial decisions are in part themselves the result of a knowledge of the law (*c*. 4). It seems to follow that a history of our law ought to go back to, or be founded upon, that system of law which was the earliest civilised law known in the country, and was established here for ages. Because in that system of law it needs must be that we have the fountain whence our oldest customs were derived, the sources from which, by judicial decisions, all our subsequent law has been developed.

(*b*) Lord Hale says that “acts made before the reign of Richard I., and not since repealed either by contrary usage or subsequent acts, are now accounted part of the *lex non scripta*, being incorporated therein and part of the common law, and many of those things that now obtain as common law had their origin by acts or institutions, though those acts are now either not extant, or if extant, were made before time of memory : and that this appears thus, that in many of the old acts made before time of memory (*i.e.*, *temp.* Richard I.), and are yet extant, we find many of those laws enacted which now obtain as common law, or the custom of the realm. He says fur-

*the Common Law*, consists of those rules and maxims concerning the persons and property of men, that have obtained by the tacit assent and usage of the inhabitants of this country; being of the same force with acts of the legislature. The only difference between the two is this, the consent and approbation of the people with respect to the one is signified by their immemorial use and practice (a); their approbation of, and consent to, the other is declared by parliament, to the acts of which every one is considered as virtually a party.

The common law, like our language, is of a various and motley origin; as various as the nations that have peopled this country in different parts and at different periods (b). Some of it is derived from the Britons (c), and some from the Romans (d), from the Saxons, the Danes, and the Normans. To recount what innovations were made by the succession of these different nations, or estimate what proportion of the customs of each go to the composing of our body of common law, would be impossible at this distance of time (e). As to a great part of this period, we have no monu-

ther, that these ancient acts, now ranged under the head of *leges non scriptæ*, or customary laws, are from the Saxon laws, which he cited from Lambard's Collection, and which have since been published by Wilkins, and also more lately under the title of *Anglo-Saxon Laws and Institutes*, edited by Mr Thorpe, and next, various statutes passed in and since the reign of the Conqueror, *e.g.*, to Henry III. In these he includes the laws of William I. himself, which, he says, consist in a great degree of the laws of the Confessor, the laws of Henry I., published in the *Anglo-Saxon Laws*, *vide post*, p. 5, and the Constitutions of Clarendon, *temp.* Henry II. Then, as regards the statutes within the time of legal memory,—that is, in and since the reign of Richard I.,—he says there is very little extant in any authentic form, and mentions nothing of importance except the Charter of King John, of which, and the other charters, he truly says that “there was great confusion, until, in Magna Charta of Henry III., they obtained a full settlement, and the substance of them was solemnly enacted by parliament.” So that statutory law really commences with Magna Charta.

(a) The author here forms the well-known maxim of the Roman law, which bases the force of custom on this principle, “*Sine scripto jus venit, quod usus approbavit nam diuturni mores consensu utentam comprobant legem imitantur*” (*Inst. Just.*, lib. 1, tit. 2).

(b) This to some extent is true, but to what extent, has already been considered in the Introduction. As to the Britons, as distinct from the Romans, it would be idle to speak of the “laws” of mere barbarians. The bulk and body of our law, so far as it is civil, is Roman: but so far as it is criminal, it seems to be chiefly Saxon. It would be difficult to find anything now existing in our law, except our criminal system of procedure and the form of trial by jury, which could be said to be distinctively Saxon, nor anything at all which is distinctively Danish or Norman. When our author wrote, and real actions existed, and trial by battle and wager of law had not been abolished, it might have been otherwise, though these parts of our law were, even then, obsolete.

(c) It has already been shown in the Introduction that the Britons before the arrival of the Romans were mere barbarians, and had no “laws” at all; so that this, to mean anything, must mean the laws of the Britons after they had become Romanised, and had to a great extent adopted Roman laws and institutions, in which sense it is in substance the Roman law. The only British laws remaining—those of Howell Dhu—are of Roman origin, having been compiled long after the Roman occupation.

(d) The whole of our municipal system—our manorial system—the rules of inheritance (modified, no doubt, by subsequent usage)—the general scope of our civil procedure, and the whole substance of our law, so far as it relates to civil matters, are of Roman origin. This has been shown in the Introduction.

(e) This is the view conveyed by Lord Hale in his history; but, in the comments

ments of antiquity to guide us in our inquiry; and the lights which gleam upon the other part afford but a dim prospect (a). Our conjectures can only be assisted by the history of the revolutions effected by these several nations.

Certain it is, that the Roman had establishments in this island, more or less, from the time of Claudius (b); that they did not finally leave it till the year 448 A.D., and that during great part of that period they governed it as a Roman province, in the enjoyment of peace, and the cultivation of arts. The Roman laws were administered as the laws of the country; and at one time under prefecture of that distinguished ornament of them, *Papinian*. When these people were constrained to desert Britain, and attend to their domestic safety, the *Picts* and *Scots* broke in upon the peaceable inhabitants of the southern parts; who, unable to resist the attack, at length applied to the *Saxons* for assistance. Several tribes of Saxons landed here, and first drove the northern invaders within their own borders; then turned their arms against the Britons themselves; and having forced great numbers of them into the mountains of Wales, subjected the rest to their dominion, which gradually subsided into seven independent kingdoms (c).

• already made upon it in the Introduction, it has been observed that it affords no sufficient reason for entirely ignoring the Roman law, and its influence in the formation of our own, and thus losing the light which that law sheds upon it; nor, on the other hand, losing sight in a great degree of the Saxon laws and institutions, so far as they related to criminal matters. From these sources of information it may, it is conceived, be made out, that the civil part of our law is of Roman origin, and the criminal part of it of Saxon origin. And it is a great deal to get at the *original source* of the law upon a subject.

(a) On the contrary, there is the Roman law, there is the Romanised British law, in the old laws of Wales, and there are the Anglo-Saxon laws, and the *Mirror of Justice*—an ancient work, embodying one still more ancient, of the time of Alfred. Of the text of the former and latter of these materials, however, the author made no use; and of the other—the Saxon laws—it will be seen that he did not sufficiently appreciate them to make a full and adequate use of them. Had he done so, he would have found a far greater degree of light than he supposed to be attainable on the subject.

(b) A.D. 43. Suetonius subdued the great rebellion of the Britons, A.D. 60; Agricola completed the conquest of the island, A.D. 80; and, in the pages of Tacitus, we find that the British learned the language, and imitated the usages of the Romans. “Jam vero principum filios liberalibus artibus erudire et ingenia Britannorum studiis Gallorum anteferre; ut qui modo linguam Romanam abnuebant, eloquentiam concupiscerent; inde etiam habitus nostri honor, et frequens toga . . . idque apud imperitos humanitas vocabuntur, cum pars servitutis esset” (*In vit. Agric.*) A century and a quarter later, we find the Emperor Severus residing at York, and elevating the great jurist, Papinian, to the prefecture. His successor, Caracalla, conferred upon all free subjects in the provinces the rights of Roman citizens. This was A.D. 220. Nearly another century elapsed before the reign of Constantine—nearly another to the reign of the second Theodosius. The Theodosian code was not long afterwards published, and another generation had elapsed before the Roman rule in Britain terminated. Thus, therefore, during more than three centuries and a half, the country was thoroughly under Roman laws and Roman institutions, and its inhabitants civilised under their influence. It is not possible but that during this long period the Romans should have deeply planted their laws and institutions in the country they ruled.

(c) This is hardly perhaps accurate, and conveys an entirely erroneous idea. Guizot points out the fallacy of supposing that the conquests of the barbarians were so

The circumstances of this revolution are related to be of a kind differing from most others. The Saxons are described as a rude and bloody race; who, beyond any other tribe of northern people, set themselves to exterminate the original inhabitants, and destroy every monument and remains of their establishment (a). In so general a ruin, it cannot be imagined that the customs of the native Britons, or the laws ingrafted upon them by the Romans, could meet with any favour (b).

The kingdoms of the Heptarchy were, for a time, independent of each other; and though a like state of society and manners prevailing in all of them must of course have produced the like spirit and principle of legislation in common, yet their laws must have been specifically different. Hence grew a variety of laws among the Saxons themselves (c). In the reign of Alfred, the Danes,

sudden, so general, or so absolute as is supposed; and the idea is especially fallacious with reference to the Saxon invasions, because these invasions were successive: the contest between them and the Britons lasted for centuries, their conquests were partial and gradual, and were not quite complete when the Danish invasion took place, but ended rather in a union of the two races, by means of intermarriages and a gradual amalgamation of institutions. The contest can be traced all through the Saxon chronicles up to the tenth century, and in the course of those four or five centuries the process of amalgamation was going on.

(a) This was so only at first and to a limited extent. So soon as they had made sure their footing in the country they were content to render the Britons their tributaries; and it was only those who refused to become so who were exterminated or expelled. This appears from a passage in Bede, cited by Lingard—who says: “After the adventurers had formed permanent settlements, they gradually abandoned their former exterminating policy, and suffered the natives to retain their national institutions as subordinate and tributary states.” Bede gives an instance of both in Edelfrid, about the year 600—“qui terras eorum, subjugatis aut exterminatis, indigenis, aut tributarias gente Anglorum aut habitabiles fecit” (*Bede*, lxxxiv., *Lingard's Hist. Eng.*, vol. i. c. 2). Both Lingard and Sir F. Palgrave represent the Saxon sovereigns as thus rendering the Britons their tributaries.

(b) This inference arises from the notion, already shown to be erroneous, that the Saxon conquest was sudden and complete, instead of which it was slow and gradual; and thus, in the meantime, the two races became in a great degree united, and their institutions amalgamated, or rather the more civilised institutions of the Romanised Britons were adopted; the Saxons, still retaining also their own, which became by degrees first modified, and then, after the Conquest, superseded, as shown in the Introduction. Had the author made more use of the Saxon laws (after the conversion of the Saxons), even so early as the reign of Ina, he would have found the Briton and the Saxon put as much as possible on a footing of equality, based upon their common Christianity. The allusion here to the “customs of the native Britons,” anterior to the time of the Romans, is, as already shown, with any reference to law, entirely fallacious; and instead of the laws of the Romans being ingrafted upon those customs of a barbarous race, it is manifest from history that by degrees, as the race became civilised, they adopted the laws of the Romans, not only as being the best possible laws, but as being the only laws they had any knowledge of. And for the same reason, as is amply shown by the authorities quoted in the Introduction, the Saxons, as soon as they became settled and civilised, adopted by degrees the Roman laws, discarding, by degrees, their own barbarous usages.

(c) This was only true temporarily, if, indeed, ever really true at all; and it certainly was never true after the country was at all settled under one rule. Nothing is more remarkable, indeed, in the early history of the country, and nothing more clearly indicates the influence of the Roman law upon the barbarians, than the tendency shown in our earliest laws to imitate its comprehensive character by forming laws for both, or all the various races in the country. Thus, as already mentioned

who had long harassed the kingdom, were by solemn treaty settled in Northumberland and the country of the East Angles, besides great numbers scattered all over the realm. The Danes were after this considered, in some measure, as a part of the nation. They were suffered to enjoy their own laws within their district; and these, when their own kings sat upon the English throne, pervaded in some degree all parts of the country.

From these various causes it happened, that to-  
wards the latter part of the Saxon times, the king-  
dom was governed by several different laws and local customs (a).  
The most general of all these were the three following; the *Mer-*  
*cian Law*, the *West-Saxon Law*, and the *Danish Law*. If any of  
the British or Roman customs still subsisted, they were sunk into,  
and lost in one of these laws (b); which governed the whole king-

Laws of the  
Saxons.

in the laws of Ina, the earliest Saxon laws for the kingdom, there is an endeavour to apply the same laws to Britons and Saxons, and to blend both races under the same rule; so in the subsequent treaties between the Saxon Alfred and Guthrum the Dane, or between Edmund and Canute. And Canute and the Norman Conqueror pursued the same wise policy.

(a) On the contrary, "towards the latter part of the Saxon times," the endeavour was, whether the monarch was Saxon or Danish, to amalgamate the laws and render them uniform and equally applicable to all. And this was so far effected that it was carried out with few and unimportant exceptions, and those exceptions rather customs, or rude usages, which would never survive the least civilisation, than of anything like laws. For instance, in the laws of Canute this is very remarkable, the reason assigned being the common Christianity of the various races, both Danes and Saxons being then Christians; for he lays down a whole body of laws as equally applicable to all his subjects, without exception, and *specifies* several peculiar barbarous usages which could not even be translated out of the language of the race to which they belonged, and these, and these alone, he says, pertain to such or such a race in particular. And there is some reason to suppose that even in these instances it is rather that there were different terms in each language for the same thing, since it is obvious that they denote substantially the same thing. With these unimportant exceptions the whole bulk and body of the laws are laid down generally of the whole people, which is shown plainly by the exceptions alluded to. And at the end there is this—"And he who violates these laws, *which the king has now given to all men*, be he Danish or be he English, let him be liable," &c. (c. 84). So of the laws of the Confessor, which are general, with one or two exceptions.

(b) On the contrary, a general body of laws were framed, with one or two specific exceptions, applicable to the whole kingdom; but very far from containing all the law, or excluding the Roman law, which had become incorporated in the institutions of the country; on the contrary, there was much that was mentioned, and of which the existence was implied, but of which the origin is not to be found in any of these laws, and which, therefore, could only have been derived from the Roman law. Throughout the whole of these laws there is no law establishing the division of the country into counties or hundreds, or establishing courts of the hundred or county, nor manors, nor corporations, municipal or otherwise; nor rules of descent and inheritance, nor a variety of other matters, which nevertheless existed, and many of which are alluded to. The truth is, that these laws were only the written laws of the time, the *leges scriptæ*; but there was a vast deal of unwritten law, *leges non scriptæ*, incorporated in institutions long established in the country, and upon some of which it may be that barbarian laws or usages engrafted some excrescencies, which soon disappeared. The greater portion of these laws are little worthy of the name; they were for the most part either precepts of morality or embody some barbarous usages, such as pecuniary compositions, the ordeal, compurgators, and the like, all which before long became obsolete, and such fragments as at all resemble law are rough and rudimentary. To suppose that these comprised the whole of the laws of the country would be an egregious fallacy; they were merely the written laws of the

dom, and have since received the general appellation of *The Common Law*.

The history of this body of common law, with the divers alterations and improvements which its rules, its principles, and its practice have received at different times by acts of parliament, and by the decisions of courts, we shall endeavour to investigate and deduce in the following History.

The great obscurity in which all inquiries concerning these times are involved, renders it impossible to trace the history of laws with much certainty (*a*). For the present, we must be content if we can collect what were the outline and striking features of the Saxon jurisprudence in general; without entering into any nice discussion about the time and manner of the particular changes it might undergo during the long period before the Conquest.

If the law of a country is circumscribed in its extent by the bounds of a realm, much of its influence and operation depends on the internal divisions of it; and a history of the law would be incomplete without noticing the parts of a kingdom (*b*); so far, at

Saxon or Dano-Saxon races, the contributions they brought, so to speak, to the general law of the nation—happily (as already observed) before long to be discarded. And so far from the Roman law being sunk or lost in any of those barbarous laws, on the contrary, it was the Roman laws and institutions which have survived and remain to this day; while, for the most part, those rude and early attempts at law have for ages been matter rather of antiquarian research than legal study. And the only use of the study of them at all is to illustrate what Montesquieu long ago observed, that barbarous races may indeed have usages but cannot have laws, and to show that so soon as they were civilised enough to understand and appreciate regular law, they would gladly avail themselves of the resources of the Roman law, remodelling and modifying it perhaps, but still applying it to their own use.

(*a*) This obscurity was not a necessary incident of the study; for the laws of Romans, of Romanised Britons, and of Saxons and Danes have been preserved, and speak plainly enough; but the author, having ignored the Roman law, and hardly given sufficient attention to the Saxon laws, lost the greater part of the light which was available, and so felt himself here in obscurity. The author was wrong in assuming that all the law there was in this country in the time of the Saxons was comprised in the laws they put into writing; whereas these were only their first rude attempts at laws, and there was a vast deal of unwritten law practically embodied and in operation in actual existing institutions, to be found in the *Mirror of Justice* for instance, to which he did not advert; nor was he, it will be seen, sufficiently acquainted even with the written laws of the Saxons, while he avows that he had given no attention to the Roman period.

(*b*) Of this there can be no doubt; and therefore, as has been seen in the Introduction, the Romans always established a very complete and elaborate political organisation in a conquered country, and thus Britain with other "dioceses" of the empire were divided into "provinces," and these again were sub-divided into smaller districts under "comites," or counts, and hence called "*comitates*," or counties; and there is every reason to believe that there may have been another system of division into centuries and decennaries, for the Romans had such a division in their own country, and a large portion of this country was colonised by Roman citizens, whether of Roman, Briton, or foreign origin. Such a division was found existing here soon after the Saxon times, and no Saxon law established it, though it is alluded to in the Saxon laws as existing. And though some of the Germans had a system of dividing the population into centuries, it was only numerical and military in its nature, and does not seem to have been a civil and political division, and territorial in its character, as it was among the Romans. To adapt it, however, to the purposes of settled civil government, it is obvious that it must have been founded on the number of habitations



least, as the process of legal proceeding is affected by provincial limits.

The division of England into counties is very ancient ; but is

or estates of free citizens, rather than on mere numbers of men ; and thus would give it a territorial character. On the other hand, it will be shown that this was a mode of division which, from its nature, as necessarily numerical, could not be formed by sub-division of counties, or other divisions merely territorial, but must rather have been formed by aggregation of estates and habitations, so that the division into counties and hundreds must have been independent. The common notion that counties, which are local, were "divided into" hundreds, which were originally numerical, and only incidentally territorial, must therefore be erroneous, and that it is so is shown by the fact, that parts of hundreds are sometimes in different counties. The basis of the division into hundreds must be sought in some independent system pre-existing : and out of which it could be formed by numerical aggregation, first into tens, and then into hundreds. Now, such a system existed among the Romans, in the manorial system, the growth of that colonial system which they applied to the cultivation of a conquered country. No grants of land would be made, except to free citizens, whether of Roman, of Briton, or of foreign birth ; and these dwellings would form the basis of the division into tens and hundreds—a division which would thus be at once numerical and territorial. As the grants of land would vary in size, the hundreds would equally vary in their extent, (as is found to be the case) ; and also would be found partly in one county and partly in another. This latter fact, indeed, might also be accounted for by the boundaries of the counties having been subsequently rearranged ; but then, on the other hand, it would also show that the systems of division into counties and hundreds were distinct and independent. Further, the view here suggested as to the origin of hundreds is supported by the close connexion which has always subsisted between the hundreds and the manors. From the earliest times it has been recognised that a hundred may be parcel of a manor, or appurtenant property to a manor (*Year-book*, 11 Hen. IV. 89 ; 8 Hen. VII.) So a hundred might—*i.e.*, as a franchise, and not merely as a territory—be the property of a particular person, who, in ancient times, would probably be called or named from it, and thus there is a hundred in Devonshire named Coleridge (9 *Coke's Rep.*, s. 30), from which, no doubt, an illustrious family who have been settled there, it is known for many generations, derived their name, possibly, long before the Conquest. The mention of that name reminds the editor that Sir John Coleridge, in his valuable edition of Blackstone's *Commentaries*, expresses an opinion, as Lord Coke had done long before, adverse to the common notion that Alfred divided the counties into hundreds, or indeed that any one so divided them : and he points out their irregularity of size and position as negating that view. The view of the editor, that they were formed rather by aggregation than division, and that the counties also were so formed, is strengthened by the extreme antiquity of the court "lect" of the hundred, which, in the *Year-book*, is seen to be "the most ancient court in the kingdom" (*Year-book*, 7 Hen. VI. 12). It may here be observed, that from want of attention to the history of the subject, great doubt and obscurity arose as to the real meaning of a "hundred ;" and in the reign of Henry VII. it was actually said from the bench that a hundred meant a hundred vills, or a hundred houses, or a hundred parishes (*Year-book*, Hen. VII.) The latter idea of course is absurd ; the two former were at variance, and were so, even as long ago as the reign of Henry VII., by reason of the changes and the increase of population ; so that a hundred would contain of course far more than a hundred houses. But it was not so at the time when the country was colonised by the Romans, nor at the time of the invasion by the Saxons. The derivation suggested, however—from the manorial system, founded by the Romans—makes all plain, and reconciles these views. For although, originally, the hundred would mean a hundred free citizens, that, in the country, would mean a hundred villas, and the local and numerical division would coincide. In course of time, as the villeins became emancipated, and the villas became the centres of clusters of houses of free tenants, vills or towns would arise ; and to this day, in remote parts, a farm is called a town. And though these would be of too late a formation to have been municipalities under the Roman system, they would, many of them, become "boroughs" under the Saxon system, which was, like other Saxon customs, superinduced upon the Roman institutions. "Borhs," or boroughs, under the Saxon system, were simply aggregations of freemen into tens for the purpose of mutual guarantee and self-defence ; and thus, side by side with.



said to have been reduced to its present appearance by Alfred (a). That great prince carried his scheme yet further; and subdivided counties into *hundreds*, and hundreds again into *tythings*. This parcelling out of the kingdom into small districts, was made subservient to the well-ordering of the police, and the due administration of justice; as will be seen presently. There was another division purely ecclesiastical (b). *Parishes*, and even mother-churches,

the Roman cities or municipalities rose up the Saxon villages, towns, and boroughs. That the municipal system in England was of Roman origin is historically clear. Lord Coke indeed states that boroughs were villas, vills or towns, and were in former times taken for those companies of ten families, which were one another's pledge, and therefore in the Saxon laws called "borhs" or burghs (1 *Inst.* 109). But, as already shown, the aggregation of families into tens was of Roman origin, and only adopted by the Saxons into their frankpledge system, or, rather, probably suggested it. And it is hardly necessary to say that the Roman system was essentially municipal, and encouraged municipal corporations; and it is certain that most of our cities can be traced to Roman times, while the boroughs are of later and Saxon origin. In the *Mirror*, the body of which was written in the Saxon laws, it is said that villeins are tillers of land, dwelling in upland (i.e., country villages); for of vil cometh "villeins." And the derivation of it from the Roman "villa" is obvious. And as Littleton said, "Every burgh is a vill, but not e converso," and a vill, from villa, was originally the Roman phrase for a house in the country, while 'town' was the Saxon or British word for it. And thus, as Lord Coke says, the villeins or cultivators were so called from the word "villa," being attached to the villa or country house, or the estate belonging to it, i.e., the manor. Thus the whole organisation of the country, political, social, or municipal, appears to have been of Roman origin.

(a) The popular notion had long been that he first made this division. Even in Lord Coke's time this was understood to be a fallacy, arising from a passage in William of Malmesbury, which was either erroneous, or has been misunderstood. Lord Coke pointed out that the realm was divided into shires and counties, cities and farms, by the Britons, by which he means the Roman Britons; for, he says, the Romans called the county comitatus, and the principal officer, consul; so that King Alfred's division of shires and counties was but a renovation or more exact description of the same (1 *Inst.* 168). Thus Lord Coke cites a passage from the laws of Edward:—"Apud Britones *temporibus Romanorum* in Regno isto Britannia, vocabantur senatores, qui postea temporibus Saxonum, vocabuntur Aldermani, &c." And again, "Verum quodmodo vocatur comitatus, olim apud Britones *temporibus Romanorum* in regno isto Britannia, vocabantur consules: et qui modo vocatur vice comites, tunc temporis vice consules vocabantur." Thus, in the time of the Saxons themselves, it was recognised that these primitive institutions and divisions of the country were as ancient as the times of the Romans. The truth is, that our whole system came from the Romans, and the Saxons only gave them, in some instances, new names or new arrangement. This seems indeed indicated by the way in which the author puts it.

(b) A parish is an ecclesiastical division, as a vill or town is a civil division; but, as, originally, where there was a vill or town, there was spiritual provision made for the inhabitants, the parish was presumed to be identical with the vill until the contrary appeared, and indeed Lord Coke lays it down that there could not be a town without a church (1 *Inst.* 169); for a town meant at first a vill, from the villa of the lord of the manor; and though no doubt the provision was first made by lords of manors, on the other hand, a parish might contain a whole hundred, as the parish of Fountain Dean (*Skin.* 50; *Addison v. Otway*, *Freeman's Rep.* 218). If the hundred happened to be small, and the lords of manors poor, they might aggregate together to make a provision; and this permanent provision or endowment for a specific place or district created a parish. There can be little doubt that the manorial system was the basis of the parochial, and that the lords or owners of estates made this provision, either for churches on their own manors, or for churches for districts formed from several manors. In course of time the spiritual district thus formed for each church would be known, and thus would constitute an ecclesiastical division. So the offerings which were originally voluntary would become customary, and

were known so early as the time of king Edgar, about the year 970; for the consecration of tythes before that time being *arbitrary*, it was ordained by a law of that king,<sup>1</sup> that all tythes should be paid *ecclesie ad quam parochia pertinet*. Besides these divisions, there was another that had reference to the conditions under which the land of every one was possessed; a division which regarded the nature, description, and incidents of landed property. On this together with that of counties, depended the bounds and extent of judicature.

The lands of the Saxons were divided into *thain-land* and *reveland* (a). Land granted to the *thains*, or lords, was called *thainland*: That over which the king's

lastly would be rendered obligatory by law, and then would arise the necessity for some legal appropriation of the tithes to these ecclesiastical divisions. Hence the law of Edgar that tithe be rendered to the old church to which the district belongs, and be paid both from the lord's own demesne land and from the land of the villeins, so far as it was cultivated (*Laws of Edgar*, 1); but that if any lord had a church on his own land, he might give a third of the tithes thereto; that is, in cases where the lord had built a church on his land, subsequent to that which had by custom become the mother-church of the district (*Laws of Edgar*, c. 2). The Saxon word here used is rendered in the Latin version "parish;" and it will be observed that the earliest law relating to the subject connects the parochial endowments with the manor. The author had omitted all mention of the origin of the manorial system, which naturally would have preceded the parochial.

(a) No mention is made of this division in the Saxon laws, but it is found in Domesday. It seems, however, rather fiscal than political. Lord Coke says:—"It is to be observed that, in the book of Domesday, land holden by knights' service was called Tainland, and land holden by socage—*i.e.*, rent or certain services—was called Reeveland, which appeareth in that it is said there: 'Hæc terra fuit terra regis Eduardi Tainland; sed postea conversa est in Reveland'" (1 *Inst.* 86). Elsewhere, he says that the tains (thanes) held of the king by military service, and were freeholders, and were sometimes called *milites regis*, and their land called thane land. But *thainus regis* was a baron; and there were lesser thanes who did not hold of the king, but of great thanes (*Ibid.* 5). Hence, it appears that thane land was originally held on knight-service from the baron, but afterwards some of it became freehold land, and included land not held of the crown, but of other proprietors. All the manors were the freeholds of the lords; their villein-tenants holding of them by servile tenures. As to the reveland, it meant land held of the king by tenure otherwise than military. Afterwards, in describing tenure by knight-service, Lord Coke says:—"In ancient times they which held by knight-service were called milites, and held by such service for the defence of the realm, and had their privileges, especially freedom from tallages or taxes" (76). In Domesday it is written: "Quod thainus vel miles regis moriens, pro relevanti dimittebat regi omnia arma sua," &c. Thus, therefore, Tainland meant land held by military service, and free from the taxes the sheriff collected, and Reveland meant land liable to such taxes. It is to be observed that there are many manors in the lands of the crown, the tenants of which, who were called tenants in ancient demesne (from their holding under portions of the ancient demesnes of the crown), owed contributions in kind for the supply of the sovereign, which were afterwards commuted by talliages; and so of the tenants in burgage—*i.e.*, tenants of houses in ancient burghs or villis on lands belonging to the demesnes of the crown (*Maddox*, 520). Now, when these were held by the thanes, they settled for these talliages; otherwise,—*i.e.*, if in the lands of the crown,—they were accounted for by the *sheriff*. In process of time the lands in ancient demesne were let out or farmed at rents, and other land not of ancient demesne were so let or farmed. Such lands as the above were held by the crown for profit, and so came under the jurisdiction of the king's fiscal officer, the sheriff (shire-reeve or steward); but land held on knight-service was held, not for profit, but the defence of the realm, and so was not deemed under the jurisdiction of the sheriff.

<sup>1</sup> Leg. Eadg. cap. i.

officer (called in their language *shire-reve*, since *sheriff*) had jurisdiction, was called *reveland*. Again, the former being held by charter, was otherwise called *bocland*, or *bookland* (a):

(a) The learned author is not quite accurate here. The earliest mention of "bocland" is in the laws of Alfred (141): "The man who has bocland, and which his kindred left him; he must not give it from his kindred, if there be writing or witness that it was forbidden by those men who at first acquired it, and by those who gave it to him, that he should do so" (*Anglo-Saxon Laws*, vol. i. p. 89). Then, in the laws of Edward (A.D. 900), it was ordained as to "one who denied justice to another, either in bocland or in folcland," that he should give him a term respecting the folcland, when he should do him justice before the reeve (the sheriff); but if he had no right either to the bocland or folcland, he who denied the right should pay a fine to the king (*Laws of Edward*, s. 2; *Ang.-Sax. Laws*, v. i. p. 161). In the same laws mention is made of "folc-right." And among the Saxon oaths there is this, which evidently refers to land: "Bequeathed it, and died he who it owned with *full folk-right*, so as it his elders lawfully got and let and left in power of him whom they well gifted; and so I have it as he gave it who had it to give, and I possess it as my own property" (*A.-S. Laws*, v. i. p. 183). By the laws of Edgar, "folk-right" was to be pronounced every term in the county court (v. 7), and if a thane had a church on his bocland, he might give a third of his tithes to its support (*A.-S. L.*, p. 263). In the laws of Ethelred it is enacted that the king should have the fines of those who had bocland (*Ibid.*, 283). By one of the laws of Canute, if an outlaw had bocland, it should be forfeited to the king (s. 13, *A.-S. Laws*, vi. i., p. 383). From these passages it will be seen, (1.) that the bocland was inheritable and disposable, though it might, by special condition in the donation, be entailed or limited to the family of the donor; (2.) that as to bocland, it could become forfeited to the king by the crime of the owner, whereas this was not so as to folcland; (3.) that claims as to folcland were determined by the sheriff in the county court, whereas it should seem that claims of bocland were determinable in the king's courts. So much information on the subject is derivable from the Saxon laws themselves. Spelman describes folcland as "*terra popularis quæ jure communi possidetur, sine scripto*" (*Gloss. Folcland*). In another place he distinguishes it from bocland thus: "*Prædia Saxonis duplici titulo possidebant; vel scripti autoritate, quod bocland vocabunt; vel populi testimonio, quod folcland dixerent*" (*Ibid.*, Bocland). These definitions, it will be observed, are quite different—the former making the distinction one of tenure, the latter one rather of mere title or conveyance. Spelman, however, and Lambard, erroneously imagined that folcland was only possessed by the *common people*; and Blackstone still more erroneously (following Somner) supposes it was land held in villenage. It should seem that folcland was not inheritable or devisable except by special grant. But there are deeds or wills in which the owners of folcland beg that it may be permitted to descend to their sons (*Anglo-Saxon Dict.*, App. ii. 2). A learned author says:—"Folcland was the land of the folk, or people. It was the property of the community. It might be occupied in common, or possessed in severally; and in the latter case it was probably parcelled out to individuals in the folkmote, and the grant sanctioned by the freemen who were present. But while it continued to be folcland, it could not be alienated in perpetuity; and therefore, on the expiration of the term for which it had been granted, it reverted to the community, and was again distributed by the same authority" (*Allen's Inquiry into the Rise and Growth of the Royal Prerogative*, p. 143). The definition here given remarkably resembles that of the public lands among the Romans, and affords another instance of the illustration of our ancient law derivable from the Roman. The same learned writer also points out that the folcland was assignable to the thanes on military tenure—i.e., on condition of military services—and that again resembles the public lands of the Romans. Mention is made in the Anglo-Saxon laws of land held in common by the ceorls or husbandmen (*Laws of Ina*, s. 42). Folc-right was the original unwritten understood compact or custom by which every freeman enjoyed his land, and folcland was one of those rights. The same learned author defines bocland as "land held by book or charter—that is, land which had been severed by an act of government from the folcland, and converted into an estate of perpetual inheritance. It might be held by any freeman, and most of the land of the higher thanes consisted of it. It was alienable and devisable at the will of the proprietor, and might be limited in its descent, and it was forfeited by various delinquencies to

land of the other kind, being held without writing (probably by those who remained of the first inhabitants of the country), was otherwise called *folcland*; a distinction, which, after the feudal law was established, received other appellations of a similar import (*a*). That within the jurisdiction of the sheriff, was then called *allodial*: That held of lords, *feudal*. The possessors of such as has since been called allodial, were styled, in the laws of those times, *liberi*; being subject to the king alone in his political capacity; in contradistinction to tenants under the dominion

the state." He adds,—"Estates in perpetuity were usually created by charter, after the introduction of writing, and on that account bocland and land of inheritance are often used as synonymous." This, however, appears to confound title and tenure, for at a far later period feoffments in fee were common—that is, transfers of an absolute and inheritable property by mere open delivery of the land; and the learned writer indeed adds: "At an earlier period they were conferred by delivery, nor was this practice entirely laid aside after the introduction of writing." It is not therefore correct to say that all the lands of the Saxons were either folcland or bocland. When land was granted in perpetuity, it ceased to be folcland, but it could not with propriety be termed bocland, unless it was conveyed by a written instrument. The best possible definition of the term folcland is afforded in a passage in the *Mirror*, in which, describing the condition of the country in the earlier times, it says, that "some had their lands to hold by homage and by service for the defence of the realm, and some by villein customs, as to plough the lord's lands, to reap, and cut, and carry his corn and hay; and although the people have no charters, deeds, nor muniments of their lands, nevertheless, if they were ejected, they might be restored to their estates, because they could show the certainty of their services and works by the year, as those that their ancestors before them a long time had rendered;" and then it is added that king Edward in his time caused inquiry to be made of those who held of him by services, as to their lawful customs. It is mentioned also that a lord might give a villein land to hold to his heirs, even by taking his homage for it, without any deed. Thus the great body of the people held their lands without deeds, and only by the evidence of actual possession and enjoyment upon certain known services notorious to the people, and attested by them, and therefore called folc-right," for on any question the "folc" would, in the folcmote or county court, testify about it. And as the great body of the people held their lands by the evidence of custom, this was what made them after the Conquest call so often for the customs of king Edward—i.e., the customs known in his time.

(*a*) The next paragraph is obviously erroneous. It confounds two divisions or classifications which are plainly distinct and different. The one—the distinction between bocland and folcland—relates rather to the nature of the ground of the right, be it deed or be it custom; the other relates entirely to the nature and quality of the right, be it feudal or allodial in its tenure. And the author also further confounds these divisions with the distinction between thaneland and reveland, which again is quite different and distinct. There might be bocland not inheritable, there might be folcland which was. There might be feudal land which was not bocland, (indeed feudal tenure was never created by deed,) and yet would not be folcland, as not held by popular custom, but by military tenure. The fiscal jurisdiction of the sheriff, again, had nothing to do with feudal land or allodial land; not the former, for the services were military; nor the latter, because there were no services at all; the distinction between feudal and allodial being that the one was derived from fee-od, meaning land held by way of fee or reward, and therefore reverting on failure of the same; and the other from all-od, or land not so held, but held in full, entire property without any tenure or liability to service. Allodial land meant land inheritable, and not feudal, nor subject to services, the owner being absolute owner, and subject only to the crown in its political capacity, and therefore not contradistinguished from tenants who held under tenure of services to thanes, but from tenants who held under tenure of services to the crown; that is to say, what we now call "estate in fee-simple." It may be proper here to mention that in the ancient language of the law the custom of the country meant the custom of the *county*, and thus Bracton and Glanville speak of the customs of the different counties (lib. xiv., c. 8).

of the thains, who were called *vassals*, being subject to the control also of their lord.

Freemen.

The civil state of the Saxons was of this kind. The whole nation consisted of *freemen* and *slaves*. The *freemen* were divided into two orders, the *nobles* and the *ceorls* (a). The nobles were called *thanes*, and were of two

(a) This distinction is drawn much too sharply, and is indeed not accurate. There were nobles, freeholders, villeins, and slaves, all quite distinct classes. There were freemen, who were neither nobles nor ceorls. The ceorls (pronounced churls) were the villani of the Roman times and the villeins of the Normans; and they were not freeholders, but held on servile tenure; and though they were quite different from the "theows," or slaves, they were a species of serf, and were apparently distinguished from the freemen, the *liberi homines*, who were freeholders. The distinction between "freemen," and "ceorls," and "theows" will be found drawn throughout the Anglo-Saxon laws from the earliest times, of Ethelbert (*Ang.-Saxon Laws*, v. i. p. 9). The ceorls or villani were no doubt an inferior order of freemen, and themselves had theows or slaves (*Laws of King Alfred*, 25), and they often rose to the rank of freemen by acquiring land. The "theows" or slaves were either Saxons or Britons (*Laws of Ina*, s. 24); and it should seem from direct evidence of the laws, and the resemblance in sound between the word "theowe" and "thieve," that "thieves" were made "theows," and condemned to slavery (*Laws of King Edward*, s. 29). The lesser thanes were simply freeholders, and a "ceorl" might rise to the same rank if he had acquired land to the amount considered equivalent to a qualification (*Anglo-Saxon Laws*, p. 189); so a Briton might be free, even though he had no land, and might rise to the rank of a ceorl. The highest temporal rank was that of the earl; the next was that of the king's thanes, or nobles; then came the freeholders, who were the lesser or "medial" thanes, usually holding of the king's thanes (*Anglo-Saxon Laws*, v. i. pp. 192, 193). Then came the "ceorls," or villeins, and lastly the "theows" or slaves. The qualification was that of property, or rather, to be more accurate, a property qualification was required. "If a ceorl thrived, so that he had freeholds of his own, land and church and kitchen, *i.e.*, house, and a seat in a church, and did special duty in the king's hall, then he was thenceforth thought worthy ofthane-right. And if athane thrived so that he served the king, and had athane who followed him, &c., he became a king'sthane; and if athane thrived so that he became an earl, then was he thenceforth thought worthy of earl-right. And if a merchant thrived so that he fared twice over the wide sea by his own means, then was he thought worthy ofthane-right. And so of a scholar who through learning thrived so that he had holy orders," &c. (*Anglo-Saxon Laws*, v. i. p. 193). The alderman was the chief of a hundred (*Laws of Edgar*, 8), as the earl or count was of a county; and the sheriff (shire-reeve) was the deputy of the earl, and hence called viscount (*Laws of King Athelstane*, 91; *Laws of King Edgar*, 13). The grades of rank were earls, king's thanes, and lesser thanes (*Laws of Canute*, s. 72), "*Taini lex est ut sit dignus rectitudine testamenti sui*" (*Rectitudines Singularum Personarum, Laws of Anglo-Saxons*, p. 433).

With regard to the condition of men before the Conquest, the author omitted to notice two passages, one in BRACON, and the other in the *Mirror*. These passages show that there were under the thanes a class of men who held land by free services or customs, who were gradually raised to the position of freeholders, and this is confirmed by the Saxon laws. The *Mirror* says that by the first conquerors—which must mean the Saxons or Danes—the earls, and barons, and knights were feoffed of lands in knight-service; and villeins of villenages, whereof some receive other lands, without obligation of service, as in frankalmoigne; and some to hold by homage and service for defence of the realm; and some by villain customs, as to plough the lord's lands, to reap, cut, and carry his corn and hay, without giving of wages; and that king Edward in his time caused inquiry to be made of all such who so held and did to him such service; and *afterwards* (*i.e.*, after the Norman Conquest), many of these villeins, by wrongful distresses, were forced to do their lords other services to bring them into servitude again (c. 2, s. 28).

And this certainly agrees with a passage in Bracton, which states to the same effect: "*Fuerunt in conquestu liberi homines qui libere tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines, et cum per potentiores ejecti essent postmodum reversi receperunt eadem tenementa sua tenendain villenagio, faci-*

kinds; the *king's* thanes and the *lesser* thanes. The distinction between them seems to be, that the former were next in rank to the king, and independent; the latter were dependent on the king's thanes, and seem to have occupied lands of their gift, for which they paid rent, services, or attendance in war and peace. Noble descent or possession of land were the two qualifications that raised a man to the rank of thane. The inferior rank of freemen, called *ceorls*, were chiefly employed in husbandry; so much so, that a ceorl and a husbandman became almost synonymous. These persons cultivated the farms of the nobility, for which they paid rent; and they seem to have been removable at pleasure<sup>1</sup> (a). The next order of people, and a very numerous body they were, was that of the *slaves* or *villains*; a lower kind of *ceorls*<sup>2</sup> (b), who being part of the property of their lords<sup>3</sup> (c), were incapable of holding any themselves. These are the persons who are described by Sir William Temple, as "a sort of people who were in a condition of downright servitude, used and employed in the most servile works; and belonging, they, their children, and effects, to the lord of the soil, like the rest of the stock or cattle upon it" (d). However, the power of lords over their slaves was not absolute. If the owner beat out a slave's eye or teeth, the slave

Slaves.

endam inde opera servilia sed certa et nominata, et nihilominus libera quia licet faciant opera servilia" (*Ib.* i. c. 11, fol. 7). Hence it appears that the *ceorls* were freemen, who, however, had not generally their lands on freehold tenure, but in villenage, and that they were gradually having their tenure raised to freehold by their services being rendered certain and their tenure inheritable. And this quite agrees with the Saxon laws which distinguish the *ceorls* from the *theows* or *slaves*; and throughout, speak of them as freemen, and yet at the same time speak of them as sometimes acquiring freehold lands, which shows that though their persons were free, their lands were not so, in general.

(a) This and what follows, it will be seen, is erroneous. The *ceorls* were the *villains*, and they originally held lands of their lords on condition of agricultural service, which in a certain sense was servile, but in reality was not so, as the actual work was done by the *theows* or *slaves*, which our author confounds with the *ceorls* or *villains*. The *ceorls* did not pay rent, and were not removeable at pleasure; they went with the land, and rendered services, uncertain in their nature, and therefore opposed to rent. They were the originals of copyholders, who were deemed to hold according to the custom of the manor, and not merely according to the will of the lords; and hence, in the laws of the Conqueror, it was said, that they could not be removed at pleasure, so long as they rendered their accustomed services. Here the force of custom is seen, in modifying or creating rights. The distinction between the *ceorls* and the *slaves* will be manifest, and yet in the next sentence they are confounded.

(b) These slaves were not *ceorls*, but *theows* were slaves.

(c) All this applied only to the *theows* or *slaves*, not to the *villains* or *ceorls*. Throughout, the author confounds these classes, the reason being, as appears from the authorities he cites on this subject, that he took them at second-hand, instead of consulting the laws themselves.

(d) It is not worth while to verify this quotation, (for which no reference is given), since it is certainly wrong, as will be seen from what has been stated.

<sup>1</sup> Spelm. Feuds, p. 14.    <sup>2</sup> Persons of this rank were called by the Saxons *Theow*, or *Theowmen*, as appears by LL. Will. Cong. 65, 66, and in LL. Hen. I. 77, 78. servi.  
<sup>3</sup> Spelm. Feuds, p. 14. —

recovered his liberty<sup>1</sup>: if he killed him, he paid a fine to the king<sup>2</sup>. These slaves were of two kinds, prædial and domestic.

We shall next take notice of the judicature of the Saxons, which depended, as we before said, on the division of land. In the thainland, the thain himself was the judge (a): so the judge of the reve-

(a) That is to say in the court-baron, the court of the lord of the manor. It was only in a court-baron, or court of a manor, that (apart from every special liberty or franchise) there was any other local jurisdiction than that of the courts of the hundred of the county. On the other hand, it will be observed that the court of the lord of a manor was quite different from, and not in any way derived out of the county court, nor connected with it at all, as the hundred court was; it was rather a different jurisdiction, independent of the county court. This is noted because in a subsequent passage the author speaks of the court-baron as derived from the county court—a great mistake, arising from his not having traced the origin of the manorial system, and seen how distinct it was from the political system, to which the county belonged. So the next paragraph is incorrect in describing the sheriff as the “judge” of the county court, and his jurisdiction as arising from its being reveland—a distinction already noted as fiscal, not judicial. The sheriff was not judge of the county court, according to the Saxon theory, but the suitors or freeholders were; and so of the hundred court; but the author does not mention they were the judges. By the laws of the Saxons, the courts-baron, or the courts of the thanes or lords of manor had jurisdiction in matters arising within their manor, and between their tenants, but the general jurisdiction was in the courts of the hundred and of the county, the rule as to inferior courts being, that if the matter arose within the jurisdiction of the local court, it would be dealt with in that court, otherwise in the next higher court; and if it did not arise between parties in the hundred, then it would go to the county court. The folcmote, or county court, had general jurisdiction in matters of debt (*Laws of Alfred*, 221; *Anglo-Saxon Laws*, vol. i. 77); and the sheriffs (shire-reeves) were to hold the courts (*Laws of Edward*, 12) and were to hold the motes or assemblies every month (*Ibid.* 11). And from the same laws it appears that the county courts had unlimited jurisdiction, even as to land, provided the matter arose between men of the county, and as to land in the same county (*Laws of Edgar*, 7; *Anglo-Saxon Laws*, v. i. p. 261). The general rule was that no man should go into the king's courts unless he could not obtain justice at home, *i.e.*, in the local courts (*Ibid.*, 217). The hundred court, or the court of the county for the hundred, was to be held every month, and the general county court twice or thrice a year—the sheriff holding the county court in each hundred in turn, whence it was called his “tourn.” So, in the laws of Canute, “Let no one apply to the king, unless he may not be entitled to justice within his hundred, and let the hundred-mote be applied to, and then again let there be a shire-mote” (*Anglo-Saxon Laws*, p. 387). The lords had jurisdiction over their own tenants in their own courts, the courts-baron of the manors; but if they were accused by others, then the hundred courts had jurisdiction; and hence, in the laws of Canute, “Let every lord have his household in his own ‘burgh’ (or jurisdiction), and if any one accuse his man of anything, let him answer within the hundred where he is cited” (*Anglo-Saxon Laws*, p. 395). So in the laws of the Confessor, after stating that “*Justicia Regis cum legalibus hominibus provincæ illius assit ad judicium; barones autem, qui curias suas habeant, de hominibus suis; videant ut ita agant de eis quatenus erga dominum reatum non incurrant et regem non offendant. Et si placitum de hominibus aliorum baronum oritur in curiis suis assit ad placitum justiciæ regis, quoniam absque eo fieri non debet. Et si barones suit qui judicium non habeant, in hundredo ubi placitum habitum fuerit, ad propinquiorem ecclesiam, ubi judicium regis erit, determinandum est, salvis rectitudinibus baronum ipsorum*” (*Anglo-Saxon Laws*, p. 446). And these franchises of the lord's courts are thus explained in the same laws: “Comites, barones, et milites suos, et proprios serientes suos, sub suo frithborgo (a Saxon word, signifying jurisdiction) habebant; quod si ipsi foresacerent et clamor vicinorum insurgent deies ipsi haberent eos ad rectum in curia sua, si habebant sacham et socham, tol et theam et enfangenthef: soche est quod si aliquis querit aliquid in terra sua, etiam furtum sua est justiciæ; si inventum fuerit, an non. Sache, quod si aliquis aliquem nominatim de aliqui calumpniatus fuerit et ipse negaverit, foris

<sup>1</sup> LL. Alf. sec. 20.

<sup>2</sup> Ibid. 17.



land was the *reve*, or *shire-reve*; whose great court was called the *reve-mote*, or *shire-mote*, and at other times the *folc-mote*<sup>1</sup> (a). The limits between the official judicature of the king's courts and the court belonging to the lord, were strictly preserved: only when the lord had no court, or refused to do justice; or when the contest was between a vassal of one and a vassal of another; then the suit was referred to the king's court, namely, to the *reve-mote* of the sheriff.

Though the *sheriff*, *earl*, or *elder*man (by all which names he was known) had properly the government of the county (b), a bishop

factura probacionis vel negacionis si evenerit, sua erit. Tol, quod nos vocamus thelo-neum scilicet libertatem emendi et vendendi in terra sua. Theam quod si aliquis aliquid intercubatur super aliquem, et ipse non poterat warrantum suum habere, erit forisfactura, et justicia: similiter de calumpniatore, si deficiebat, sua erit. De infangenthef justicia cognoscentis latronis sua est de homine suo si captus fuerit, super terram suam. Et ille qui non habent consuetudines quas supra dixerimus, ante justiciam regis faciunt rectum, etiam in hundredo, vel in wapentagiis, vel in schiris" (*Laws of Edward the Confessor*, c. 22). And if a thing was found, and a question arose, "Si dominus in cujus terra inventum est non habet consuetudines suas scilicet socham et sacham, omnia liberabit prefecto hundredo si haberi voluerit. Et si dominus ipsis habet suas consuetudines, in curia domini sui teneat rectum" (*Ibid.*)

(a) This was the county court, which was, so lately as the reign of Henry II., the only court for ordinary suits between party and party above the court of the hundred. There was also the court of the county for the hundred, which was held once in every four weeks (*Laws of Edward*, s. 11; *Anglo-Saxon Laws*, p. 165). It is there laid down that the reeve or sheriff of the county should hold a "mote" once in every four weeks; and from subsequent laws it appears that this meant in the hundred (*Laws of Edgar*, 5, p. 269). "Let the hundred-mote be attended as before, and twice a year a shire-mote." And no man was to apply to the king, unless he could not get justice in the hundred (*Canute*, 17); and twice a year there was to be the shire-mote (*Ibid.* 18); the elderman might preside over each hundred (*Laws of Henry*, 1, 8). And thus the hundred court was a civil court, though it was also criminal (*Laws of William*, 51.) As already seen, the hundred court, like any local court, would not have jurisdiction unless the matter arose, and both parties resided, within its local limits; and hence the necessity for the larger jurisdiction of the county court or "tourn"—the former the civil, the latter the criminal jurisdiction, held by a kind of "tourn" or circuit twice a year, when all causes, civil or criminal, arising within the county could be tried. The *Mirror* says, in a part of the work the antiquity of which is obvious, "Des assemblies primes vindrent consistoires que l'un appel courts, et ces in divers lieus, et en divers manieres, dont l'un court tenoient les viscounts de mois en mois; on et celes courts sont appellees counties ou les judgments si sont par les suitors, si bref ne y soit, et ceo est per gurrant de jurisdiction ordinaire. L'autre mesmes courts sont les courts de chacune sieurs del fief al foer del courts hundreds. En les quelles courts ouent connaissance de detes et de transgressions et tiels autres petits peches que ne passent my 40 s. en le valem. Et aussi elles ont connaissance de trespass et forfeitures des fief parenter ces sieurs et leur tenants. Autres mesne courts sont, que les bailiffs de Roy tenoient, en chescun hundred, de trois semaines, et les suitors des fief tenants des hundreds (*Le Myrroure des Justices*, c. i. s. 15). Here it will be seen that the county courts were held in various places, no doubt hundreds—once a month; which were distinguished from the great county courts, held only twice a year, answering to our assizes. And that the courts baron were distinguished from the courts of the county, or hundred, as having only jurisdiction to the amount of 40 s.; except on matters of tenancy, as to the lands within the manor.

(b) This is inaccurate. The earls, counts, or comites, were chiefs of counties; the sheriffs—vice comites or viscounts—were their deputies; and ealdermen, who answer to our modern aldermen, were chiefs of hundreds. It is only in the most general way that these latter dignities could be identified, as it is explained in the laws of the

<sup>1</sup> Dalr. Feud. Prop. p. 11.



was always associated with him in judicial matters. The *bishop* and *sheriff* used twice a year to go a circuit, within a month after

*The tourn.* Easter, and a month after Michaelmas; and held the great court called *the tourn*, in every hundred in the county (a). This was the grand criminal court, in which all offences both ecclesiastical and civil were tried. On the examination of the former, the bishop sat as judge, and the sheriff as coadjutor, to inflict temporal punishments: in the latter, the sheriff was judge, and the bishop his assistant, to aid his sentences if necessary, by ecclesiastical censures.

*County court.* The great court for civil business was the *county court*, held once every four weeks (b). Here the sheriff presided; but the *suitors of the court*, as they were called, that is, the freemen or landholders of the county, were the judges; and the sheriff was to execute the judgment; assisted, if need were, by the bishop. Once a year, at the Easter tourn or circuit, the sheriff and bishop were to hold also a *view of frankpledge*; that is, to see that every person above twelve years of age had taken the oaths of allegiance, and found nine *freemen pledges* for his peaceable demeanour.

*Other inferior courts.* Out of the tourn were derived two inferior criminal courts, the *hundred* and the *leet*, for the expeditious and easy distribution of justice, where a hundred or manor lay too remote to be conveniently visited in the course of the tourn. The hundred court was held before some bailiff; the leet before the lord of the manor's steward (c). Both these, though held in the

Confessor, "reve" being a general appellation. "Reve autem nomen est potestatis; est enim multiplex nomen: reve enim dicitur de scira, de hundredi, de villis; et sicut modo vocantur reves, qui habent prefecturas super alios, ita tunc temporis eldermen; non propter senectutem; sed propter sapientiam" (*Ang.-Sax. Laws*, p. 456), and the term eldermen in this sense was general, and is sometimes applied to the chief of the county as well as the hundred (*Laws of Canute*, s. 18). But all through the laws the office of reve, or sheriff, or shire-reve, is spoken of as distinct from that of elderman or earl; which latter indeed was rather a name of dignity than of office. "Twice a year, let there a shiremote, and let there be present the bishop of the shire and the elderman" (*Laws of Canute*, p. 1-18; *Ang.-Sax. Laws*, p. 38).

(a) Here is the account of it in the *Mirror*, c. i. 16, title "de tornis." "Les Viscounts d'ancien ordonnance tenent assemblees generales deux fois per l'an en chescun hundred, au tous les fre tenants dedeins le hundred sont obliges devenir par l'usage de leur fiefs; et pur ceo que les viscounts a ceo faire font leur tornes de hundred sont tiels venus appellez tornes des viscounts; ou aux viscounts appert d'enquerer de tous peches personal et de tous circonstances de peches faits en ceux hundreds, et de torts faits au roy et al commonalty del people. Trestouts fief tenants en hundred ne sont mys tenus a vener a ceux tornes Car l'Roy Hen. III. le tiene excusa ascunes persons, et dist que al tornes des viscounts ni estoit mester que Archevesques, Abbes, Priors, Comites, Barons," &c. (*Mirror*, c. i. p. 16). In the reign of Henry II., however, it was laid down that the bishops and barons ought to attend these great county courts, civil and criminal; which were gradually superseded by the circuits of the king's judges. It was not until the reign of Richard II. that it was enacted that no lord, little or great, should sit upon the bench in the counties, when the king's judges were.

(b) This is inaccurate, *vide ante*. It was the hundred court, or the court of the county in the hundred, which was held monthly.

(c) This is incorrect, as will appear from what already has been stated. The court

name of a subject, were the king's courts. Out of the county court was derived an inferior court of civil jurisdiction, called the *court baron* (a). This was held from three weeks to three weeks, and was in every respect like the county court; only the lord, to whom this franchise was granted, or his steward, presided, instead of the sheriff.

In all these courts, justice was administered near the homes of suitors with despatch, and without much expense. Besides these, there was a superior court, known by the name of the *wittenagemote*, which had a concurrent jurisdiction <sup>The wittenagemote.</sup> with them (b). This court sat in the king's palace, and used to

of the hundred was not derived out of any other, nor was it a criminal court only, but civil; and the reason given for it here is obviously inadequate. The principle was that justice should be as local as possible; and the necessity for courts of larger jurisdiction arose, as already explained, from the necessarily limited scope of a local jurisdiction. The court of the leet was not derived from the court of the tourn; it might be the court of the manor, and a peculiar local jurisdiction. So, as to the court baron, it had nothing to do with the court of the hundred, but was the peculiar court of the manor. This has been already amply explained in the passage from the laws of the Confessor. *Barones que curias suas habent de hominibus suas, &c., et si placitum de hominibus aliorum baronum oritur si curiis suis assit ad placitum justicia regis, &c.* It was the principle of convenience which led our ancestors to make their tribunal as local as possible, but the more local it was the more the infirmity of a local jurisdiction is made manifest, by restricting it to matters arising within that local jurisdiction, and hence the more manifest the necessity for courts of larger jurisdiction.

(a) The author, it will be observed, has confounded the court leet, or court baron, with the hundred, but it will be seen from the following case, how entirely distinct they might be. It is to be borne in mind that the word leet, or assembly, was a general term. And the court leet might either be the hundred court, or it might be the court baron. The leet means assembly or meeting, and was a general word applicable either to the hundred court or to the court of a manor. Thus in a case where, in justification of taking the plaintiff's cattle, the defendant pleaded that place was within a certain hundred and the sheriff's tourn of the hundred; and at a leet within the hundred the plaintiff was prosecuted for a nuisance and fined, the plaintiff replied that the bishop was seised of the manor, and had a right to have a leet distinct from the leet of the hundred (*Loader v. Samwell, Croke, Jac. 551*). It was said:—"Le Leete est le plus ancient court in le realme" (*Year-book*, Hen. VI. 7, 12); and there can be no doubt that though the name "leet" is Saxon, the court had its origin in the formation of the hundred in the Roman times, as the court barons were also incident to the "villa" and the manor. In the course of ages some of the land had changed hands, but the jurisdiction continued over all residents within the manor. *Sicut al leete, n'est done per reason le soil, mes resiancy del person* (*Year-book*, 7 Edw. II. p. 204). It is said again that la venue a la lete est autre que soil ou court que la venue est a real jurisdiction, que de commune droit donne la vewie per reson de la person, so that it was no answer that the party held his land of another person than the lord of the leet (*Ibid.* 276; 11 Edw. II., fol. 345). It had jurisdiction only over common nuisances (27 *assize*, 1; 22 Edward IV. 22; 4 Edward IV. 31). A particular private wrong could not be inquired of at the leet, as an assault (per Martin, J. 4; Henry VI. 10). The essence of the leet was prescription, and it was limited by prescription (2 *Inst.* 72). The notion that the leet was the king's court was of modern origin. These local courts not being king's courts, they could not inquire of trespasses committed with force, for which a fine was due to the king (*Year-book*, Edw. IV. 8, 15). The court leet was rather a criminal court in its nature. The court baron was the civil court of the manor.

(b) This it should seem is a mistake. The wittenagemote appears to have been rather a council than a court, and though it is probable that, in the earlier times, the distinction between the legislative and judicial functions may not have been well drawn, yet in the time of the Confessor there are traces of the existence of a "Curia Regis," to which probably the remainder of this paragraph more properly refers or applies. At all events there is mention made of the "Justicia Regis;"

remove with his person. The judges, it is said, were the great officers of state, together with such lords as were about the court. The business of this court consisted in causes where the revenue was concerned; where any of the lords were charged with a crime; and in civil causes between them. This was the ordinary employment of the court: besides which, offences of a very heinous and public nature, committed even by persons of inferior rank, were heard here originally; and all causes in the inferior courts might be adjourned hither, on account of their difficulty or importance.

The next object of consideration is the nature of property among the Saxons: and first, of landed property. It has been a question, long debated among the learned, whether the lands of the Saxons were subject to the terms of feudal tenure, or whether tenures with all their consequences were introduced by William the Conqueror. It would hardly afford much instruction or amusement at this time, to enter deeply into an inquiry which has been already so unsuccessfully discussed, and which has divided so many great names. Lord Coke,<sup>1</sup> Selden,<sup>2</sup> Nathaniel Bacon,<sup>3</sup> Sir Roger Owen (*a*), and Tyrrell,<sup>4</sup> are of opinion, that tenures were common among the Saxons (*b*). Crag,<sup>5</sup> Lord Hale,<sup>6</sup> Somner,<sup>7</sup> Sir Henry Spelman,<sup>8</sup> Dr Brady, and Sir Martin Wright<sup>9</sup> are of opinion that feuds were first brought in and established by the Conqueror. After this dif-

and in the laws of the Conqueror, drawn up about the same time as the laws of the Confessor, this "*Justicia Regis*" is distinguished from the viscount or sheriff (*Laws of Cong.* 2). The author makes no mention, however, of the rise of a regular royal judicature among the Saxons—a most important era of our legal history, since, as shown in the Introduction, such a judicature is really the parent of regular law. In the county court there was no judicial element. It was a mere popular tribunal.

(*a*) The author here in a note explains that he alludes to a manuscript in the Harleian Collection, entitled "*The Antiquity and Excellency of the Common Law of England*," which he says "was written with a view to maintain the popular argument of the times, that our constitution and laws were derived from the Saxons, and that the Conqueror made no alteration thereon," and he dismisses it as of no importance.

(*b*) It is a matter of historical certainty that this was so. It has already been seen that the Romans had a system of military tenure which was established in this country, and existed during all the period of the Saxon conquest, which lasted for centuries. And it has also been seen that some such system existed in Germany. From traditions, both of our national usages and of the Romans, it was natural that the Saxons should establish a similar system of military tenures, and they undoubtedly did so. The land was assigned on condition of military service; the greater thanes held directly of the king, the lesser thanes of them; and what more was necessary to constitute in substance the feudal system? This was still more clearly the case under the Danes; and the "*heriots*," as described in the laws of Canute, were, for earls, king's thanes, and the lesser thanes, entirely military (*Anglo-Saxon Laws*, p. 415). The heriot was a species of relief, and involved in it the rudiments of the burdens of the feudal system. No doubt that system was, under the Saxons, in a rude and imperfect stage; and was only developed in the time of the Normans. So, also, there was forfeiture; for if a man who had land of his own forsook his lord, he forfeited it—another evidence of feuds or fiefs (*Anglo-Sax. Laws*, p. 456).

<sup>1</sup> 1. Inst. 776.

<sup>4</sup> Introd. vol. ii. p. 84.

<sup>7</sup> Gavel. 100.

<sup>2</sup> Titles of Honour, 510, 511.

<sup>5</sup> Jus. Feud. lib. 1. tit. 7.

<sup>8</sup> Glos. Feudum.

<sup>3</sup> Hist Disc. 161.

<sup>6</sup> Hist. Com.-Law, 107.

<sup>9</sup> Ten. 57.

ference of opinion, some later writers have taken a middle course. Blackstone,<sup>1</sup> Dalrymple,<sup>2</sup> and Sullivan<sup>3</sup> endeavour to compromise the dispute, by admitting an imperfect system of feuds to have subsisted before the Conquest.

Perhaps the latter of these opinions may be nearest the truth. A system of policy that had prevailed over all parts of Europe, it is most probable, got footing in England, inhabited by persons descended from the same common stock, and possessed of the country they then enjoyed under like circumstances with the nations on the continent. But the feudal law, in the time of our Saxon kings, was in no part of Europe brought to the perfection at which it afterwards arrived; and in this country, separated from the world, and receiving by slow degrees a participation of such improvements as were made in jurisprudence on the continent, we are not to look for a complete system of feudal law. At the latter part of this period, feuds on the continent were very little more than in their infant state; they were seldom granted longer than for the life of the grantee.<sup>4</sup>

Without engaging in a controversy whose extent and difficulty have eluded the greatest learning and sagacity, it will be more satisfactory to notice such few facts as we really know respecting the landed property of the Saxons. We know that their lands were liable to the *trinoda necessitas*; one of which was a *military service* on foot; another, *arcis constructio*; and another, *pontis constructio*. They were in general hereditary (*a*); and they were partible equally among all the sons (*b*). They were alienable at the pleasure of the owner; and were divisible by will. They did not escheat for felony (*c*); and the landlord had a right to seize

(*a*) The bocland seems to have been so (*vide ante*), though the deed of grant might define and limit the course of descent, and hence the law of Alfred, that a man who had bocland should not alienate it from his family, if the deed provided that it should not be so alienated.

(*b*) According to the British law—that is, after the Roman occupation—the land was partible among all the sons, as is recited in the Statutum Walliæ, 12 Ed. I., *quod hæreditas partibus est inter hæredes masculos*. Among the Saxons, the laws of Canute, *cited post*, show that the estate was divided among all the *children*; and Lord Hale thinks that, until the Conquest, the descent was to all the sons, and probably to all the daughters, for which he cites the laws of the Confessor (*Ang.-Sax. Laws and Instit.*); and Selden in his notes upon Eadmerus, says “Siquis intestatur obierit, liberi ejus hæreditatem æqualiter dividunt.” After the Conquest, the law by degrees changed; except in Kent, where, according to the old British, or rather Roman-British law, called the custom of gavelkind, all the land is still partible among all the sons. In the reign of Henry I., as Hale says, “the whole land did not descend to the eldest son, but began to look a little that way,” and he cites the *Leges Henrici Primi*, c. 70, *Primum patris feudum primogenitus, filius habet*; upon which he observes that the eldest son, although he had *jus primogenituræ*, the principal fee (or estate) of his father’s land, yet had he not all the land. In the reign of Henry II., as appears from Glanville (lib. 7), in ordinary freehold lands called “socage” (*i. e.*, land not held on military tenure) the *jus commune*, or common law, gave all the land to the eldest son, unless there was an ancient custom to the contrary, “unless the land was *antiquitus divisum*. Si ne vero non fuerit antiquitus divisum, tunc primogenitus totam hæreditatem obtinebit.”

(*c*) This is a mistake, for in the law of Athelstane, it is laid down that if a thief was

<sup>1</sup> Vol. ii. p. 48.

<sup>2</sup> Feudal Prop. 8.

<sup>3</sup> Lecture 28.

<sup>4</sup> Lib. Feud i. tit. 1.

the best beast or armour of his dead tenant as a heriot (*a*). This is the principal outline of the terms on which landed property was possessed among the Saxons.

Method of conveyance. It should seem that a legal transfer might be made of lands by certain ceremonies, without any charter or writing (*b*). Ingulphus says, *conferebantur prædia nudo verbo*,

taken, he should forfeit all he had, though part was to be given up to his family, and the rest retained by the king (*Ang.-Sax. Laws*, 229); and a man who had bocland forfeited it *even* for outlawry (*Ibid.*, *Laws of Canute*, 13; Henry I. 13), and if he forsook his lord (*Ibid.* 456); so that it would not be probable that there was *not* forfeiture for felony even if there were nothing to show that there was. Lord Coke maintained that there *was*.

(*a*) In the laws of Canute, the reliefs of earls and thanes, whether king's thanes or medial thanes, are described, and are entirely military in their nature, so much so, that the law is copied into the collection of laws of Henry I. They consisted of horses and their military accoutrements. There is strong evidence that the foundation of the feudal system already existed, that is, military service for the defence of the realm, and there is also the appearance of what Guizot calls the hierarchical system, which was characteristic of it.

(*b*) In the Anglo-Saxon Chronicle, A.D. 657, mention is made of a deed of grant of lands by Wulfhere, king of the East Saxons, to the monastery of Medeshewsted (Peterborough), and it is stated that the king "subscribed it with his fingers on the cross," evidently being unable to write, and being what is called a "marksman," i.e., attesting an instrument only by putting his finger on his mark. The grant was thus, as the Chronicle says, executed in the presence of witnesses, "who subscribed it with their fingers on the cross, and assented to it with their fingers," and this was done in the presence of the nobles and bishops, and several ealdormen. Three centuries afterwards, the deed was found concealed in the walls of the monastery (which had been destroyed by the Danes), and it was solemnly confirmed by Edgar in the presence of prelates, nobles, and ealdormen, and the franchises of sack and sock, toll and theam, and infangenthef, were also granted (*Sax. Chronicle*, A.D. 963). It is also mentioned that the abbot of this monastery let to an ealdorman ten copy-lands, with all that lay thereto, for £50, and each year a day's entertainment, or 30s. in money, and that, after his death, it should return to the monastery. The witnesses to this are mentioned (A.D. 777). It is added, "A copy of this grant was set forth in presence of the king, in the monastery, in the year 745." And as there is no doubt that Glastonbury monastery had large grants from early Saxon kings, and their charters have every sign of genuineness, there appears no reason to question their authenticity. As laws were written in the seventh century, *deeds* might well be, and there are laws of Ethelbert, who reigned in the middle of that century (*Anglo-Saxon Laws and Institutes*, vol. i.) It appears, however, that these kings could not write, and probably the nobles could not, as all but the prelates signed, or rather attested, by means of marks in the form of the sign of the cross; so that they could only be cognizant of the contents of the deeds as they were read to them. And no doubt they were, when they became Christian, greatly under the influence of ecclesiastics, though, as Guizot points out, that influence was exercised in favour of civilisation. In the same Chronicle mention is made of a charter of immunities granted by Ethelwulf, the father of Alfred, A.D. 846. The same grant is mentioned by Ingulphus and by Asser, though in the year 855. The charter contained a passage which has given rise to much controversy as to tithes.

In William of Malmesbury, mention is made as early as A.D. 721 of a royal grant or charter by Ina, a Saxon king (the first of those who framed laws after becoming Christian), to the monastery of Glastonbury. It was thus: "I do grant one of those places which I possess by paternal inheritance, and hold in my demesne, for the maintenance of the monastic institution (so many hides at such a place, and so many hides at another), and I grant that all places and possessions of the monastery be free of rent, and undisturbed from all royal taxes and works which are wont to be appointed; that is to say, expeditions, and the building of forts or bridges, and cities, as is found to be empowered and granted by my predecessors in the ancient charters of the same church:" so that, according to this recital, there were still earlier charters in the seventh century; but these might, if they stood alone, be

*absque scripto vel chartâ, tantùm cum domini gladio, vel galeâ, vel cornû, vel cratere, et plurima tenementa cum strigili, cum arcu, et nonnulla cum sagittâ.*<sup>1</sup> Thus Edward the Confessor granted to the monks of St Edmund, in Suffolk, the manor of Brok *per cultellum*; <sup>2</sup> and holding by the horn, by the sword, by the arrow, and the like, were common titles of tenure. However, deeds or charters were in use (a). These were called *gewrite*, i.e., writings; and the particular deed by which a free estate might be conveyed was usually called *landboc*, *libellus de terrâ*, a donation or grant of land.<sup>3</sup> The land so passed was, as has been already observed, called *bocland*; and the person who so conveyed to another was said to *gebocian* him of it. An Anglo-Saxon charter of land has also been called *telligraphum*; <sup>4</sup> the etymology of which mongrel term seems to imply that the land was therein described by its situation and bounds. But this appellation was probably adopted after the Conquest, as a translation of the word *landboc*. The like may be said of the term *cyrographum*, another name by which Anglo-Saxon charters were known: but those denoted by this name were of a peculiar kind; such as had the word *cyrographum* written in capital letters either at the top or bottom of the charter, and cut through or divided by a knife.<sup>5</sup>

Before the time of Edward the Confessor, the usage was to ratify charters by subsigning of names accompanied with holy crosses. This was done both by the parties and witnesses. It is generally believed that Edward the Confessor was the first who brought into this kingdom the custom of affixing to charters a seal of wax. It is said, that being in Normandy, at the court of his cousin William, he there learned several Norman customs, and among others, which he transplanted hither, was this of sealing deeds with wax. Though the word *sigillum* often occurs in charters before his time, yet some great antiquarians (among whom is Sir Henry Spelman) have agreed that this did not mean a seal of *wax*, but was used synony-

deemed of doubtful authority, as William was not a contemporary. Some twenty years later, however, another charter or grant by Ina's successor is set out: "I declare that all the gifts of former kings in country houses (*villæ*), and in villages, and lands, and farms, and mansions, according to the confirmations made, and *confirmed by autographs and the sign of the cross*, shall remain inviolate."

(a) It is plain, however, that deeds were in use among the Saxons, although, as even their kings could not read or write, they were executed by sealing instead of signing. The very word *bocland* demonstrates that they had deeds. There is a law of Alfred restraining alienation of land from the kindred where it had been acquired, by a donation in writing restraining such alienation. "*De eo qui terram hæreditariam habet quam ei parentes sui demiserunt, ponimus ne illam extra cognationem suam mittere possit, si scriptum intersit testamenti, et testis quid eorum prohiberent qui hanc imprimis adquisierunt, et ipsorum qui dederunt ei ne hoc possit, et hoc in regis et episcopi testimonia recitetur, coram parentela sui (Laws of Alfred, c. 41).*" It would not appear, however, that deeds of alienation were in common use. In the Saxon version of the above, the words rendered *terram hæreditariam* are "*bocland*." It is certain that deeds were used for donations to public bodies, such as monasteries.

<sup>1</sup> Hist. Croy. 901, Franc. 1601.

<sup>4</sup> From *tellus* and *γραφω*.

<sup>2</sup> Mad. Form. Diss. pa. 2.

<sup>5</sup> Mad. Form. Diss. 2.

<sup>3</sup> Mad. Form. 283.

mously for *signum*, and denoted the sign of the cross and other symbols made use of in those times.<sup>1</sup>

There is no evidence that the Saxons made any distinction between real and personal property: the whole property of a man was described by the general term *res*, and under that denomination was subject to the same succession *ab intestato*, and might be given or disposed of by will.

We are not to imagine that the power of disposing by will was allowed without restriction (a), for we have every reason to conclude, from the prevailing custom of the realm in the next period, that they restrained a man from totally disinheriting his children, or leaving his widow without a provision. After such duties were reasonably performed, the remainder of his effects were at his own disposal. Consistently with such sentiments, we find the law, with regard to the estates of intestates, delivered in these words:<sup>2</sup> *Sive quis incuriâ, sive morte repentiniâ fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito. Verùm possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure distribuantur* (b).

There does not appear sufficient in the monuments of Saxon antiquity to make us assured in what manner they ordered the authentication of wills (c). It may, however, be conjectured, with some

(a) It does not appear that wills were used among the Saxons. As already seen, deeds of alienation, *inter vivos*, were known among them, and it would seem that their alienations were usually of that nature. The law of Alfred already quoted, restraining alienations of land from the kindred, does not seem to allude to wills, but alienations *inter vivos*. It speaks of *terram hereditariam*, and implies that land ought to descend to the children, or next of kin, at all events if it was *obtained* in the family; and the greater the regard paid for the claims of descent or relationship, the less likely is it that there would be alienations by will.

(b) The law of Canute implies, that all property, real and personal, was distributed among the relations, for it says that if any one should die intestate, be it through neglect or sudden death, let the property be distributed justly among the wife and children and relations, according to their degrees (*Laws, Canute, 71*). This implies that there were wills at that time, and also that distribution of intestate estates was settled.

(c) There is no trace to be found of wills in the Saxon times, and all the instances of alienations or dispositions of property to be found in the Chronicles are cases of alienations *inter vivos*. If, however, wills were known, as they involved writing, and none could write or read except the ecclesiastics, it is pretty certain, *a priori*, that the wills would be authenticated by being recorded or enrolled in some ecclesiastical registry; and accordingly, as we know the registries of wills, when they afterwards became known, were ecclesiastical, the instances to the contrary were probably cases of manors originally held by ecclesiastics, or by some laymen who, for a wonder, *could* write and read, and therefore obtained this privilege for themselves, or rather for the convenience of their tenants. The law of Alfred already alluded to makes mention of authentication by the bishops and aldermen, and they both had seats in the Saxon county courts, which, however, would be most useful for a registry of wills, or for distribution of the effects of intestates, and it is probable that both would be committed, for the sake of convenience, to the bishops. Reasons would render it convenient then which would not exist in modern times. What the author means by its being "clear" that in the county courts the estates of intestates were administered, cannot be divined. There is no trace of it, and he, of course, gives us no authorities. It would appear that, by the latest laws of the Saxons, the rule of law was the

<sup>1</sup> Mad. Form. Diss. 27.

<sup>2</sup> Leg. Can. c. 68.



probability, that cyrographated or indented copies might be left with the alderman or sheriff of the county, or with the lord who had a court or franchise, where, besides the hearing of causes, other legal proceedings, spiritual as well as temporal, were usually transacted. It is more clear (*a*) that in this court was made the distribution of intestates' effects, according to the proportions above laid down. From this may be derived the privilege which the lords of some manors claim at this day, to have probate of wills in their manor-court, without the control or interposition of the bishop.

All contracts for the buying or bartering of anything were required to be made in the presence of witnesses (*b*). This was as much to prevent the sale of things stolen, or improperly obtained, as to preserve the memory of contracts and obligations. A law of king Etheldred ordained,<sup>1</sup> that if there were no witnesses to a contract, the thing bargained for should be forfeited to the lord of the soil, till inquiry was made about the real ownership.

This regulation about contracts is frequently enforced in the Saxon laws, and the beneficial consequences of such strictness must have been universally felt. It had the effect of precluding questions and litigations about matters of contracts, and keeping the law of property in a very plain and intelligible state.

distribution of the effects of an intestate among the relations; for, among the laws of the Conqueror, professedly founded upon the Saxon customs, there is this: *Si quis paterfamilias casu aliquo sine testamento obirit, pueri inter si hareditatem paternam æqualiter dividant* (*Laws of the Conq.* c. 34); and as regards real property, that was the rule of law as well as with regard to personalty. The law, however, implies that wills were sometimes used, though it is probable, in such a simple state of society, and writing being so little known, it was very rarely there was a testament, and intestacy was the rule.

(*a*) There is not any evidence of this.

(*b*) It is desirable to make an explanation here upon a matter not quite understood by the author, and which has an important bearing upon the question of trial by jury. It is admitted that jurors, in the infancy of the system, were witnesses, and hence the origin of the rule, that they must come from the vicinage, that is, from the very "vill," or, at all events, the hundred, where the matter arose, and they were supposed to determine on their own knowledge. Hence, also, the jury arose out of the court of the hundred, and were, in fact, a certain number of the hundredors sworn, and sworn, originally, to give a verdict of their own knowledge. Now, the object of the presence here referred to was to secure that the hundredors should have knowledge of every contract made, and with that view it provided that no contract of which they had not knowledge should be deemed valid. The provision is repeated in the laws of all the Saxon kings (Edward I., Athelstane I. 10, Edward V., Edgar 6, Ethelred I. 3, Canute 24, Edward Confessor 28). The laws of Ethelred and Canute require that the witnesses shall be in the "borh," or hundred, and the laws of Edgar make the connexion clearer between this provision and the trial by jury; for they required that in every borh and in every hundred, so many were to be chosen and set apart as witnesses, and in every hundred, twelve—the number, be it observed, afterwards chosen for the number of a jury. These witnesses were to be sworn to speak truly in any matter that might arise, and of them *some* were to be witnesses of every bargain made (*Laws of Edgar*, 41–45), to which the law of Ethelred adds a penalty. Now, here it is obvious that this was in substance providing pre-appointed jurors for particular matters; for jurors were witnesses, and this law simply provided that they should have the requisite knowledge of the matter in hand. This, then, was the origin of trial by jury.

<sup>1</sup> Ca. 4.



As the forms and circumstances under which property could become a subject of debate in their courts were few and simple, so the proceedings must in a like degree have been uniform and unembarrassed. While the objects of legal inquiry admitted of little modification, and contained very little artificial learning, the free-men or landholders of the county were, no doubt, very competent judges of the matters they were to determine, and the parties themselves were equally qualified to be their own advocates. Causes were commenced by lodging a complaint, the admission of which by the officer of the court, and giving a day to the parties, constituted, perhaps, all the practical knowledge of the bar (*a*).

Before we speak of the criminal law of the Saxons (*b*), let us

(*a*) In the laws of Edgar, it is provided, under a special ordinance as to the hundred, that they meet always within four weeks, and that every man do justice to one another—that is, according to the award of his neighbours—for this is what it came to. This arbitration of neighbours, as it is the earliest form of civil jurisdiction resorted to, so it is most remarkable, that it is invariably resorted to in the age of highest civilisation, as most convenient, and far preferable to hostile and formal litigation. The whole tendency of our own procedure has been for ages, and is now more strongly than ever, to encourage arbitration, and substitute it as much as possible for hostile litigation. In the same law it was ordained that in the hundred folk-right should be pronounced in every suit, and that a term be fixed when it should be fulfilled (*Edgar*, 7), and that the sheriff hold a court in each hundred once a month (*Edward*, 11).

(*b*) It might, perhaps, have been more natural and convenient to consider first the nature of the crimes and punishments defined by the Saxon law; next, the procedure for trial and punishment; and lastly, the peculiar proceedings provided by way of security of compensation in default of punishment, which is here described. But our author has inverted that order, and considered first the system of security, next the compensation, and lastly the crimes. It resulted, perhaps, from this that he failed to consider, except very cursorily, the law as to crime, apart from the system of compensation, and that his review of the subject is extremely imperfect; the more so, since he did not have recourse to the ample exposition of the Saxon criminal law contained in the *Mirror of Justice*. The peculiar system of frankpledge above explained was only a species of supplement to, or security for, the execution of the criminal law, and it had a close connexion with the system of pecuniary compensation, for of course pledges could only be made responsible for such compensation. But then, as the author himself mentions further on, there were crimes which did not admit of compensation, which applied only to such personal injuries as might be regarded as rather private in their nature, and more of the nature of aggravated assaults, such as would be proper subjects of actions for compensation (although in these rude times rather more severe than in our own age), and did not apply to crimes public in their nature, as tending to endanger the public peace and general security—such as housebreaking, burning of houses, open robbery, manifest homicide, and treason. These, it was declared by the law of Canute, should not be the subject of pecuniary compensation, and were, therefore, left to the ordinary criminal justice of the realm, which our author hardly describes at all. Yet a remarkably full account of it is given in the *Mirror of Justice*, which bears upon its face, in various parts of it, and especially in those parts which relate to the criminal law, traces of an origin in an earlier work of the age of Alfred. At all events, it gives the forms of indictments in all cases of serious crimes, and the mode of trial, substantially the same as in our own time; and there is probably no part of our law which has so little altered in its general course and tenor. The names given are all unmistakably Saxon; in many instances the names of the Saxon kings, under whom the cases occurred, are given; and in others, the names of the judges, which are all evidently Saxon, and must have been before the Conquest—since after that era the names of the judges are known, and were all Anglo-Norman. Moreover, the nature of the crimes described after, afford internal evidence that the times referred to are very early. Thus, for instance, as to treason, it is defined in a way in which it certainly would not have been defined

take a view of that remarkable institution so necessary towards a due execution of it; that is, the police established by Alfred.

It is said that a hundred neighbouring families <sup>Decennaries, bo-</sup> composed *a hundred*, as the name imports; <sup>roughs.</sup> ten such families constituted a *tything*, *decennary*, or *fribourg*, over

by any lawyer after the Conquest, as including the falsification of the seal of a manor, so as to defraud the lord of the same. So as to the next section: of Burners, who are described as those who burn a city, farm, or house, men, beasts, or other chattels feloniously, in time of peace, for hatred or revenge. And if any one *put a man into the fire*, whereby he is burnt or blemished by the fire, although he be not killed by the fire, nevertheless it is an offence for which he shall die. Now we know from the Saxon Chronicles, that ages before the Conquest men were burnt to death by their enemies, but no trace of such atrocities can be found in the later times; and it is evident that they mark a state of society characterised by savage ferocity. So under the head of Mayhem, which is described as "the deprivation of a member or the enfeeblement of it by breaking or cutting the bones of a man," whereby he is less able to combat—a crime very common among the Anglo-Saxons in their earlier and more savage ages, as is shown by the earlier of these laws, but which gradually disappeared before the Conquest, at all events became comparatively rare; but it is evident that at the time the work quoted was originally written, it was the subject of frequent judicial decision; for the author at once quotes several judicial dicta of judges, with pure Saxon names. "And *Turgis* saith that the loss of the fore teeth is 'mayhem,' and *Sennall* saith that the loss of the eye is 'mayhem,' and *Billing* saith that rasure by turning the bones of the head is 'mayhem.'" Now it is worth observing (1.) that all these names are pure Saxon; (2.) that in two cases the dicta are reported in the present tense: "*Billing* saith," as if the judge were still alive at the time it was written, and the *dictum* quite recent; and (3.) it is to be noted that *Billing* is afterwards given as the name of a judge who was hanged by Alfred; so that, on the whole, it is manifest that these cases are as old as the age of Alfred. So again, as to the crime of larceny, it is evident that the definition given is extremely ancient, for it actually comprises all those who suffer thieves to pass when they may arrest them; "and those who steal by false measures and false weights, or in any other manner of fraud by colour of merchandise." And it is curious to note that it includes cases of bailiffs, and receivers of goods, who steal in not giving their accounts, as to which the old law has, in our own times, been restored by the statutes as to embezzlement and as to fraudulent bailees. So, as to felons flying to avoid arrest, judicial dicta are given of Saxon judges, one of whom was afterwards hanged by Alfred. "*Bermond* decided that the goods of those who fled should be forfeit to the king." Now, afterwards, this very name is given as that of a judge who was hanged by Alfred. The book purports to have begun with the time of Alfred, and to have continued in the times of subsequent kings, so that it would contain cases as old as Alfred; though it also includes cases of subsequent Saxon kings up to the Conquest, and also of kings after the Conquest up to Edward I., but the ancient parts can easily be distinguished, and indeed are often expressly identified with a particular reign. Thus, as to the forms of indictment, the first given is that for treason, "according as it was done in this case in the time of king Edmund." Here, again, the names also are pure Saxon. "*Rocelyn* saith against *Wallgrot*, that at such a day, in such a year of the reign of such a king, into such a place came the said *Wallgrot* to this *Roceyn*, and found him to be in counsel and in assistance with *Ashelung*, *Turkille*, *Bollard*, and others, to arrest, or to make prisoner, or to kill, our said king Edmund, and, to do the same, they were sworn to keep counsel" (*Mirror of Justice*, c. i., s. 11). Here is a precedent of an indictment for treason undoubtedly as old as the time of Edmund, who reigned in the middle of the tenth century, Alfred having died at the beginning of it. Again, treason is set forth in this manner, "as it is found in the rolls in the time of king Alfred. *Bardulf* here doth appeal *Darling* for that" (*Ibid.* s. 13). So there are precedents given of indictments for all the felonies—murder, rape, burglary, robbery, arson, &c.; and it is to be observed as another mark of antiquity, that burglary is defined as housebreaking for robbery, whether in the day or night; whereas, in our law, for ages it has been the essence of the crime that it should be committed at night. The names used are always the plainest Saxon—*Osmond*, *Saximund*, *Darling*, *Carling*, *Billing*, *Harding*, *Atheling*, &c. There is an indictment

which an officer presided, called *the head of the fribourg*.<sup>1</sup> Every man in the kingdom was expected to belong to some decennary, and those who did not were considered in the light of offenders, or at least of suspected persons, and were accordingly put in prison till they could get some one to take them in, or become pledge for their good behaviour. In these decennaries, every man was a security for the rest, *pledging* himself that all and every of them should demean himself orderly, and stand to the inquiries and awards of justice. It was from such reciprocal engagement between the *free* members of a decennary, that this sort of community was commonly called *frankpledge*. If

for heresy, which is exceedingly curious, and said to be "according to that which is found in the rolls of the ancient kings:"—"I say, Sebourne there is defamed by good people of the sin of heresy, because that he of evil art, and by belief forbidden, and by charms and enchantment, took from Brighton the flower of his ale, whereby he lost the sale thereof;" or this, "Molling is defamed, for that such a day he denied his baptism." No one will deny the extreme antiquity of these absurd indictments, in which slander, heresy, and enchantment were all mixed up together most strangely. Although, however, on this particular head of offence there may appear some absurdity, yet, speaking generally, the definitions of crimes are not only marked by sound sense, but are in substance, with some exceptions, those which prevail in our present law. Thus, under the head of distresses, it is pointed out that men may cover that robbery by distress, that is, might commit robbery under colour of distress; and it is said, "ye are to distinguish whether it be by those who have power to distrain, or by others, and, if by others, then therewith an appeal of robbery:" whereof it is said "Hailif gives a notable judgment;" who Hailif was being left to the reader's presumed knowledge of him—an evident indication that the passage was written when Hailif was alive, or when his memory was recent, for he is cited just as any judge might be cited in our own day. So as to criminal procedure. On the one hand, it is manifest that the procedure described is as ancient as the Saxons, and, on the other, that it was in substance the same as in our own time. Thus it is said, Thurmond ordained that criminal actions (prosecutions) for revenge (*i.e.*, for punishment) should cease at the year's end (s. 22); a passage which is evidently most ancient, for the name of the judge is Saxon, and the notion of any limitation of criminal prosecution was not known in later times. Again, it is said as to indictments, "there may be exceptions against the person of the indictor, for no villain can indict any man," which shows the antiquity of the passage. Or, if the indictment be not made by the whole dozen of freemen, or if it be not sealed with the seals of the twelve jurors (s. 15), which shows that indictments were presented by juries just as they are now, at all events in the king's courts. And it is equally clear that they were tried by juries; for in a subsequent part of the work cases are given in which Alfred had executed judges for tampering with juries, &c. "He hanged Marks, because he judged During to death by twelve men who were not sworn; he hanged Thurston, because he judged Thuringer to death by a verdict of inquest taken, *ex officio*, without issue joined; he hanged Rombold, because he judged Lischild in a case not notorious, without indictment; he hanged Fribnone, because he judged Harpen to die, whereas the jury were in doubt of the verdict, for in doubtful cases one ought rather to save than to condemn; he hanged Cordwine, because he judged Hackwy to death without the consent of all the jurors, and whereas he stood upon a jury of twelve men, and because three would have saved him against the nine. Cordwine removed the three, and put others upon the jury, upon whom Hackwy put not himself." These words are the precise words now used and recorded in a criminal trial, when the prisoner is said to put himself upon his country to be tried, as upon a jury. These extracts will suffice to show that the system of criminal law and of criminal procedure, which prevailed as far back as the time of Alfred, was in substance similar to those which prevail at this day; and there is probably no part of our law which is of such antiquity as that of our criminal procedure. It is only the systems of frankpledge and compensation which our author now proceeds to notice which are obsolete.

<sup>1</sup> Leg. St Edw. 20.

any one fled from justice, the term of thirty-one days was given to the decennary to produce the offender. If he did not then appear, the head of the fribourg was to take two principal persons of his own decennary, and from the three neighbouring decennaries, the head and two of their members: these, together with himself, making twelve, were to purge him and his decennary from any wilfulness or privity to the offender's crime or flight: and if the head of the fribourg could not purge his decennary in this way, he and his decennary were, of themselves, to make a compensation to the party injured.

So great care was taken that persons should be well known before they were harboured, that if any one took a stranger in, and suffered him to stay three nights under his roof, and the stranger afterwards committed any crime, the person so harbouring was considered as having made himself a *pledge* for him, as for one of his own family, and was, upon the absconding of the offender, to make amends to the injured person.<sup>1</sup>

An establishment like this contributed more effectually than any other to the prevention of crimes, as well as to the detection of offenders.

We shall now take a cursory view of the penal code of this people (a). The Saxons were particularly curious in fixing pecuniary compensations for injuries of all kinds, without leaving it to the discretion of the judge to proportion the amends to the degree of injury suffered. These

(a) The author gives a very imperfect idea of it, as he confines himself to the written laws, and those of the earlier and ruder age. No doubt at first not only bodily injuries but even death could be compensated, though there is reason to suppose that this applied rather to such cases as would now be called manslaughter; hence simple homicide is spoken of, and there is no epithet used to denote what we would deem murder; while, on the other hand, in the criminal law of the Saxons, as disclosed in the *Mirror*, murder appears to have been capital. The written laws, which bear the name of Alfred, may have been the early records of ruder customs, which, at a later period of his reign, he may have altered. Certainly, the idea of his criminal law, as conveyed in the *Mirror*, is very different from what it appears in his written laws. In the written laws of Ethelred, indeed, we find that homicide and even theft are punishable even with death, unless the king allows the penalty to be redeemed (*Eth.* vii. 15). And in the laws of Canute we find that housebreaking and mere robbery and murder are declared to be "botless," i.e. not redeemable by pecuniary penalty (*Laws of Canute*, c. 651). And the punishment to be inflicted by Canute's laws are horrible; cutting off the feet or hands, the nose, the ears, or the upper lip, nay, even scalping, were allowed (c. 30). The sentences which, according to the *Mirror*, were inflicted by Alfred, were extremely severe—in some, even cutting off the hand. The laws of the Confessor, as collected under the Conqueror, contain no criminal penalties except that (borrowed from Canute) as to the murder of a Dane. But it may be gathered that, as under the Confessor, the criminal code was mitigated, for in the laws of William, professedly based upon the customs of the Confessor, the pecuniary penalties are allowed, and there is a clause prohibiting the infliction of death for the lighter offences (*Laws of Conqueror*, 140). Later in his reign, however, the Confessor adopted the more severe penalties of Canute's code. It is probable that the mildness of the Confessor's criminal justice may have been partly the cause of the fondness with which the people always spoke of his laws, and the great anxiety they always showed for the restoration of them.

<sup>1</sup> Leg. St Edw. 27.

penalties were more or less, according to the time or place in which the wrong was committed, or the part of the body or member which was injured.<sup>1</sup> The cutting off an ear was punished with the penalty of thirty shillings; if the hearing was lost, sixty shillings: so, striking out the front tooth was punished with a fine of eight shillings; the canine tooth, four shillings; the grinders, sixteen shillings:<sup>2</sup> if a common person was bound with chains, the amends were ten shillings; if beaten, twenty shillings; if *hung up*, thirty shillings.<sup>3</sup>

In the same manner, injuries to property were generally considered in a criminal light; and the specific amends to be made by the wrong-doer to the injured party were fixed by law. A man who mutilated an ox's horn was to pay tenpence; if that of a cow, then only twopence. A like distinction was made between cutting off the tail of an ox or a cow.<sup>4</sup> To fight or make a brawl in the court or yard of a common person was punished with a fine of six shillings; to draw a sword in the same place, even though there was no fighting, with a fine of three shillings: if the party in whose yard this happened was worth six hundred shillings, the amends were treble, and they were increased further, according to the circumstances of the person whose house and domain were so violated.<sup>5</sup>

A system of regulations framed on this principle seems to have converted all notions of civil redress for injuries into a criminal inquiry; while the degree and circumstances attending the fact, both which it was out of the power of legislation exactly to reach, made no part of the judicial consideration; but the judge was to award the same stated fine in all cases which could be brought within the letter of the legal description. However; these penalties had so far the nature of a civil redress, that they were given in the way of compensation to the injured person.

The notion of compensation runs through the whole criminal law of the Anglo-Saxons, who allowed a sum of money as a recompense for every kind of crime, not excepting the taking away the life of a man. Every man's life had its value, called a *were*, or *capitis estimatio*. This had been various at different periods; <sup>6</sup> in the time, therefore, of king Athelstan, a law was made to settle the *were* of every order of persons in the state. The king, who on this occasion was only distinguished as a superior personage, was rated at 30,000 thrymsæ; <sup>7</sup> an archbishop or earl, at 15,000; a bishop or ealderman, at 8000; *belli imperator*, or *summus præfectus*, at 4000; a priest or thane, at 2000; a common person, at 267 thrymsæ. It seems this *were* was sometimes different in different parts of the country.<sup>8</sup> When any person was killed, the

<sup>1</sup> Leg. Inæ. 6; Leg. Alf. 23.

<sup>2</sup> Leg. Alf. 40.

<sup>3</sup> Leg. Alf. 31.

<sup>4</sup> Leg. Inæ. 59.

<sup>5</sup> Leg. Alf. 35.

<sup>6</sup> Leg. Inæ. 69.

<sup>7</sup> A thrymsæ, according to Du Fresne, was worth fourpence. According to this, 30,000 thrymsas = £500; 15,000 = £250; 8000 = £133, 6s. 8d.; 4000 = £66, 13s. 4d.; 2000 = £33, 6s. 8d.; 267 = £4, 9s.

slayer was to make compensation to the relations of the deceased, according to such valuation. In the case of the king, half the *were* went to his relations, and half to his people. If the deceased was a stranger, or had no relations, the *were* was to be divided, half to go to the king, and half to the most intimate companion of the deceased.<sup>1</sup>

As the manners and notions of this people would not allow them to submit to any harsher punishment in the first instance, it was endeavoured to render this as severe as possible. The *were* was not to be remitted;<sup>2</sup> and, to make the offender an example, as well as to prevent the effusion of blood, all his own relations were, by a law of king Edmund,<sup>3</sup> discharged from the obligation of abetting him against the *feud* of the relations of the deceased, whose deadly resentment he was to support *alone*, till he had paid the *were*. A person guilty of homicide was also excluded from the presence of the king.

But this *were*, in cases of homicide, and the fines that were paid in cases of theft of various kinds, were only to redeem the offender from the proper punishment of the law, which was death; and that was redeemable, not only by paying money, but by undergoing some personal pains: hence it is that we hear of a great variety of corporal punishments. A person *often* charged with theft was to lose his hand or foot.<sup>4</sup> There was also the pain of banishment and slavery,<sup>5</sup> and at one time it was enacted<sup>6</sup> that house-breaking, burning of houses, open robbery, manifest homicide, and treason against one's lord, should be *inexpiable* crimes; that is, not to be redeemed by any pecuniary compensation, or any pain or mutilation.

Thus far of punishments. We come now to consider the notions they had of crimes, and their nature (*a*). A person present

(*a*) It is curious that this law is not to be found among the laws of Canute; and, on the contrary, the scope and spirit of the laws (which bear the impress of great candour) is to exhibit a perfect equality between the two races; and by the previous laws the fine or penalty was the same whether a Dane or an Englishman. In the *Mirror of Justice*, however, there is this passage:—"King Canute ordained for the safeguard of the Danes whom he left in England, that if a man unknown was killed, the whole hundred should be amerced to the king by the judgment of murder," which was only an application of Alfred's law of frankpledge, that every freeman should enter into a hundred or a tithing, who wishes to be entitled to "*were*," in case any one should slay him (*Laws of Canute*, c. 20, *Anglo-Saxon Laws*, p. 387). And he who violates these laws, which the king has now given to all men, *be he Danish or be he English*, let him be liable to the king (*Ibid.* 84). The only references given by the author are, it will be observed, not to that of Canute, but to the laws of the Confessor (those very laws which he in a subsequent part of this chapter describes as spurious); and in the passages to which he refers there is nothing of the kind. Sec. 15 is only to the effect that in case of murder the "*vill*" or the hundred shall be responsible, and section 16 is "*de inventione murdre*"—"murdra quidem inventa fuerunt tempore Canuti regis qui post acquisitam terram, et secum pacificatam, remisit domine exercituum suum preclari baronum de terræ: et ipsi fuerunt fidejussores erga regem quod illi quos retinent in terra primam pacem haberent. Ita quod si quis de Anglis aliquem ipsorum

<sup>1</sup> Leg. Inæ, 22.<sup>4</sup> Leg. Inæ, 18.<sup>2</sup> Leg. Edm. 3.<sup>5</sup> Leg. Can. 6.<sup>3</sup> Ca. 8.<sup>6</sup> Leg. Can. 61.

at the death of a man was looked on as *particeps criminis*, and as such was liable to a fine.<sup>1</sup> A person killing a thief, unless he purged himself by oath before the relations of the deceased, relating all the circumstances of the fact, and that immediately, was to pay a fine.<sup>2</sup> If one in hewing a tree happened to kill a man, the relations were entitled to the tree, provided they took it within thirty days;<sup>3</sup> which was in the nature, and might perhaps be the origin, of *deodands*. It does not appear that they made any distinction in the degrees of homicide; except in one instance, which

Murder.

deserves particular notice; and that is, where the fine called *murdrum* was to be paid. It is said, that Canute, being about to leave the kingdom, and afraid that the English might take advantage of his absence to oppress or destroy his own subjects, the Danes procured the following law in order to prevent secret homicides: That when any person was killed, and the slayer had escaped, the person killed should be always considered as a Dane, unless proved to be English by his friends or relations; and in default of such proof, that the vill should pay forty marks for the Dane's death; and, if it could not be raised in the vill, that the hundred should pay it. This singular provision, it was thought, would engage every one in the prevention or prosecution of such secret offences.<sup>4</sup> It was upon this sort of policy that presentments of *Englishery*, as they were afterwards called, were founded.

Larceny.

Larceny, called by the Saxons *stale*, might have been committed by a child of ten years old;<sup>5</sup> but afterwards this crime was not imputed, unless the child was twelve

interficeret, si non possit defendere se iudicio Dei ferro vel aquo, fieret iusticiæ de eo." It will be seen that there is nothing in this to support the above version of the supposed law. In the laws of the Confessor allusion is made to a law of Canute's, simply to the effect that if a Dane were killed by an Englishman, and the latter could not defend himself by ordeal, he should suffer death, the hundred being liable to a fine if he escaped. This was applied by William to the protection of the Normans (*Laws of William the Conqueror*, c. 21); but as the law only applied if it was a Norman killed, it was taken that, so far as regarded that part of the law, unless the deceased was shown to have been an Englishman, he should be taken to have been a Frenchman (*Laws of Henry I.*, c. 75, and c. 92). So, according to Bracton, "Pro Anglico veo et de qui constare possit quod Anglicus sit, non dabitur murdrum," i.e., the fine so called (*Ibid.* c. 15, p. 135). This was the origin of presentments of Englishery, which are explained in the *Mirror*, where it is laid down that it should be inquired of what kindred or lineage those that were killed were, so that we may know by their parents whether they were of the English nation or not. And thence it is that we called that parentage Englishery, where the parentage could be found of the father's or of the mother's side; and if no Englishery be found, then it hath the judgment of murder. It is remarkable that no mention of this should have been made in the laws we have of Canute, but it may be explained, perhaps, as a mere temporary law, enacted on a special occasion in the earlier portion of the reign of Canute, and that the laws which go by his name, which were enacted in the latter part of his reign, and represent the results of his more mature and enlightened policy, deliberately excluded the law in question, as founded upon a bad principle, or tending to perpetuate feelings of jealousy between the two nations, whom it was his object to consolidate and unite.

<sup>1</sup> Leg. Inæ, 33; Leg. Alf. 26.

<sup>4</sup> Leg. Confess, 15, 16.

<sup>2</sup> Leg. Inæ, 34.

<sup>5</sup> Leg. Inæ, 7.

<sup>3</sup> Leg. Alf. 13.



years of age.<sup>1</sup> If all the family of the offender were privy to the stealing, they were all to be made slaves.<sup>2</sup> Where there was not that privity in a family, the mulct was, at one time, sixty shillings; at another time, one hundred and twenty shillings.<sup>3</sup> Such regard was paid to the character of a wife, and the subjection she was supposed to be under to her husband, that when anything stolen was found in their house, the law considered her as no party in the stealing, unless it were manifestly in her separate custody.<sup>4</sup>

The more atrocious of these offenders, when they came in a body of seven, were called *theof*, or *prædones*; if more than seven, they constituted *hlothe*, or *turma*; if more than thirty-five, they were then called *herge*, or *exercitus*.<sup>5</sup> These distinctions show in what manner these people carried on their depredations in the times before Alfred reformed the police.

False swearing was, at first, only punishable by a fine of one hundred and twenty shillings.<sup>6</sup> Afterwards,<sup>7</sup> false swearers were considered as no longer entitled to credit, and were obliged to purge themselves not by their own affirmation on oath, but by the ordeal: they were sometimes excommunicated.

Breaches of the peace were severely punished, as leading usually to bloodshed and death. If a person fought in the king's palace, his life was in the king's hands, unless he redeemed it with a fine;<sup>8</sup> and particular penalties were inflicted on those who fought in the presence of the bishop and calderman;<sup>9</sup> or in the city or town where the bishop and calderman were then holding their court.<sup>10</sup> A law of king Edmund's was so severe,<sup>11</sup> that if any one attacked another in his house, or broke the peace there, he was to forfeit everything, and his life was to be at the king's disposal. The great occasion of violent breaches of the peace, were the *deadly feuds* by which people in those times

Deadly feuds.

revenged the death of a relation. This method of prosecuting offenders had become so habitual to the people, that it appeared necessary even to make it a part of the penal code; and it was accordingly inserted under reasonable restrictions in a law of Alfred.<sup>12</sup> At length, it was thought expedient to impose additional checks on this singular piece of criminal jurisprudence. This was done by a law of Edmund;<sup>13</sup> which directs that somebody, in the nature of an arbiter, should be deputed to the relations of the deceased, and engage that the slayer should make compensation. He, in the meantime, was to be put into the hands of this arbiter, who was to see that sufficient sureties were taken for paying the *were* in twenty-one days; during which time there was to be peace, by mutual compact.

<sup>1</sup> Leg. Athelst. 1.

<sup>4</sup> Leg. Inæ, 58; Leg. Can. 74.

<sup>7</sup> Leg. Edw. 3.

<sup>10</sup> *Ibid.* 36.

<sup>13</sup> Leg. Edm. 7.

<sup>2</sup> Leg. Inæ, 7.

<sup>5</sup> Leg. Inæ, 13, 14, 15.

<sup>8</sup> Leg. Alf. 7.

<sup>11</sup> Leg. Edm.

<sup>3</sup> Leg. Athelst. 1.

<sup>6</sup> Leg. Inæ, 12.

<sup>9</sup> *Ibid.* 15, 34.

<sup>12</sup> Leg. Alf. 38.



Very early after the Saxons had been converted to Christianity, places of public worship were held in such reverence that a criminal flying thither was, during his stay there, allowed protection, whatever his crime might be (a).<sup>1</sup> It was usual to fly to such a place of security, to avoid the instant resentment of the aggrieved party, till provision could be made for paying the legal compensation. In a state of society like that among the Anglo-Saxons, the immunity indulged to places of worship was politic, humane, and necessary. It prevented the shedding of blood, and preserved the peace. Accordingly a penalty was inflicted on those who dared to violate this place of sanctuary by evil treating the culprit while there;<sup>2</sup> the *pax ecclesiæ* being more sacred, and in this instance better protected by law, than the *pax regis*. The offender might stay there thirty days, and was then to be delivered to his relations unhurt and safe.<sup>3</sup> Notwithstanding this regard for churches, there seems to have been no immunity granted to the persons of churchmen (b). If a clerk committed homicide, he was to be degraded from his orders, and was, moreover, to make his compensation, or suffer punishment, in the same manner as any other person (c).<sup>4</sup>

(a) The Saxon laws carried to the utmost extent the power, privileges, and immunities of the church, of which the sanctuary was only an instance. That particular right is expressly sanctioned in the laws of Alfred, Ethelred, and all the subsequent Saxon kings. The Saxon laws also enforced the payment of tithes, church rates, and Rome-feoh or St Peter's pence (*Laws of Edgar, Ethelred, and Edward*). The bishops were to sit in the county courts (*Edgar 5, Canute 18*), and the preambles of the Saxon laws show that the bishops also sat in the Wittenagemote or Great Council. The law also recognised the canon or ecclesiastical rules, and as far as possible enforced them (*Laws of Ethelred and the Confessor*). Thus, in the laws of the Confessor, "Si quis sanctæ ecclesiæ pacem frerit, episcoporum tunc est justicia. Et si eorum sententiam depigiendo, vel superbe contempnendo, parvipenderit, justicia regis mittet eum usque dum Deo primitus et rege postea satisfecerit." Any one who held of the church was not to be compelled to plead in any other than the ecclesiastical court. "Quicumque de ecclesia tenuerit, vel in feudo ecclesiæ manserit, alicubi extra curiam ecclesiasticam non placitabit, si in aliquo forisfactum habuerit donec quod absit in curia ecclesiastica de recto defecerit" (*Laws of the Confessor*, c. 4). The church was above all to be free in the appointment of her own ministers, of whatever order. No one was to reduce a church to servitude, or turn out a church minister, without the bishop's consent (*Anglo-Saxon Laws*, vol. i., p. 343). Lastly, ecclesiastical persons could not be prosecuted in the lay courts. Thus, the laws of Ethelred: "If a priest become a homicide, or otherwise commit a flagrant crime, let him forfeit his order and be an exile, or what the Pope may prescribe to him. If a priest stand in false witness, let him be cast out of the community of ecclesiastics, unless he do as his bishop may direct him" (*Anglo-Saxon Laws*, vol. i., p. 347). This is repeated in the laws of Canute, where it is said, "We will that men of every order submit each to the law which is becoming to him" (*Ibid.*, p. 367). If a man in holy order defile himself with a crime worthy of death, let him be seized, and held to the bishop's doom, according as the case may be (*Ibid.*, p. 403). And in the *Mirror of Justice* it is stated that king Alfred hanged a judge who had hanged a clerk in holy orders, who was not subject to his jurisdiction (*Mirror of Justice*, c. 5). The author, in his quotation in the next sentence, has omitted the essential words, as the bishop may direct.

(b) *Sed vide ante.*

(c) These are mistaken references, and the laws referred to have nothing to do with the period; but there are two of Canute's laws directly to an effect the contrary of what

<sup>1</sup> Leg. Inæ, 5.

<sup>2</sup> Leg. Alf. 2.

<sup>3</sup> *Ibid.* 5.

<sup>4</sup> Leg. Can. 36, 38.

The bringing of criminals to justice was very much facilitated by the police established in the reign of Alfred (*a*). The objects which next present themselves, are the proceeding, the mode of trial, and the proof; all which were very remarkable parts of the Anglo-Saxon jurisprudence (*b*). The prosecutor, or accuser, as he

is stated in the text. "If a servant of the altar be a homicide or work iniquity enormously, let him forfeit both degree and order, and go walk as the pope shall prescribe to him and do penance." And if he *would* clear himself, *i.e.*, if he elected to do so, then he was to do it in the way pointed out for priests by a former law (*Ethelred*, c. ix., 19); but if he did not do so, or practise the penance prescribed, then he was to be an outlaw (*Canute*, c. 41). In no case was he to be tried before the lay courts. So again, "If a man in holy orders do a crime worthy of death, let him be seized and held to the bishop's doom" (*Canute*, 43).

(*a*) The system of frankpledge, *vide ante*.

(*b*) The author does not give any intelligible account of it, and cites no authority about it; and it will be manifest that he had not given much attention to it, and had only attended to the two barbarous and primitive modes of procedure by compurgation and by ordeal. No authority is cited for the next proposition, that a mere accusation was sufficient to put the accused upon his defence; and it is quite contrary to the whole tenor of the later Saxon laws and the cases recorded in the *Mirror of Justice*. As early as the reign of Edgar and Ethelred mention is made of presentments by twelve sworn freemen jurors, who answered to our modern jurors; and Alfred is recorded to have hanged a judge who sentenced a man to be hanged without an indictment or presentment on oath by such jurors or sworn indictors. The laws of Ethelred begin, "that every freeman have a 'borh,' or borough, that they may present him to every justice if he be accused, but if he be infamous let him go to the ordeal," so that the ordeal was only for those who were not worthy of credit, and then only upon sworn presentment. If the man could obtain compurgation he would avoid the ordeal, which was only the ultimate resource, failing compurgation, upon a charge made by the neighbours upon oath (*Ang.-Sax. Laws*, v. i. 282). And again, the laws of Ethelred provided that in the hundred twelve thanes or freeholders were to be sworn that they would accuse no innocent man, nor conceal any guilty one (*Ibid.* 295), which is precisely the present oath of the grand jurors. In the laws of Ethelred there is this remarkable provision set down, "and where thanes (or freeholders) are of one voice; if they disagree, let that stand which eight of them say" (*Ibid.* 299). So, from the *Mirror of Justice*, it appears that indictments were by the oaths of jurors (c. ii. s. 15), and that it was only if there were no witness the trial by ordeal was resorted to, and it was even then discredited and discouraged as a relic of heathenism (c. iii. s. 23). And unless the ordeal was resorted to, the proof lay upon the prosecutor. The subject of the criminal procedure of the Saxons, with reference to the mode of trial, and the recourse to compurgation, ordeal, or jurors, is one of extreme difficulty and obscurity, and as to which, it will be observed, the author gives little, if any, assistance. After much study, the editor ventures to propound this view, that these proceedings arose, one after the other, by gradual growth, as the result of practical experience; and that they arose in this order, first, simple denial on oath, then compurgation, then ordeal, and trial by jury. If a thief were taken in the act, the case was quite clear (*Ina*, 28), and no trial was needed (12). If the accused was not taken in the act, then at first he was required to clear himself by his own oath (*Ina*, 17, 46, 57)—that is, if oath worthy (54). But it would be necessary to judge whether the man was credible, and hence some one else of known credit might join with him, and even then it would be necessary that some sort of tribunal should decide whether the man had cleared himself; and hence it was said, "if he be found guilty," then there should be a penalty (*Ina*, 54). "Found guilty" could only mean found guilty by the hundred court, and hence there was a trial, and compurgation was only a species of evidence or mode of proceeding at the trial. In the treaty between Alfred and Guthrum the practice of compurgation is brought out clearly; and the accused, to clear himself, had to get eleven freeholders to join with him in swearing (*Ang.-Sax. Laws*, 155). It is remarkable that no mention is made of ordeal, and, by the *Mirror of Justice*, we find that in Alfred's time there was trial by jury in criminal cases. It is in the laws of a later reign, Edward's, the ordeal is first mentioned; and this is most remarkable, and really looks as if there had been a recourse to the ordeal to solve

was called, made his charge ; which, it should seem, was sufficient alone to put the person accused on his defence. The defence and answer to this charge was this : If it was a matter not of great notoriety, but such as might admit of some doubt, the party *purged* himself by his oath, and the oaths of certain persons (called thence *compurgators*) vouching for his credit, and declaring the belief they had that he spoke truth. If the compurgators agreed in a favourable declaration, this was held a complete acquittal from the accusation. But if the party had been before accused of larceny or perjury, or had any otherwise been rendered infamous, and was thought not worthy of credit, he was driven to make out his innocence by an appeal to heaven, in the trial by *ordeal*. This was of several kinds. The two principal were by water and iron ; by water hot or cold, and by hot iron : the iron was to be of one, two, or three pounds weight ; and was, therefore, called simple, double, or triple ordeal.

cases of doubt too difficult for the rude minds of that age ; it was provided that he should go to the oath, and if he failed in that, then to the ordeal (*Ibid.*) All this was at the hundred court, and it is plain that these were sworn men to determine the case ; and that "oaths and ordeal" were used as means to assist them in determining in cases where the evidence left them in doubt, or where they had no knowledge of the matter one way or the other. For jurors in those early days were witnesses, and men had small capacity of weighing evidence. Thus, therefore, the whole of these processes were blended, and if the jurors did not know enough of the matter to enable them to judge, and the compurgation or oaths failed to satisfy them, then there was recourse to the ordeal, which was thus only used as the resort when all other means of getting at the truth had failed. Mention is made of the ordeal in the laws of the Confessor (*e.g.*, *Ang.-Sax. Laws*, v. i. p. 445). And after the Conquest, trial by battle prevailed, which was not less barbarous. But as jurors grew more intelligent, and would attend to evidence, those barbarous usages died out by degrees. That the hundred court was the criminal tribunal, and that evidence was used when available, appears from the later laws of Edgar. For there it is said, that if a thief denied the doom of the hundred, and it be afterwards proved against him, he should pay a penalty (*Edgar*, 3). But at the end of those laws the ordeal is mentioned. Subsequent laws of Edgar provide for sworn witnesses of every transaction, and that if a criminal charge arose out of it, they might determine the matter by their testimony or verdict to the hundred ; for if the accused said that he had bought the things in the presence of the witnesses, and they so declared to the hundred, he would be absolved ; but if they declare that it was not so, he would be convicted (*Edgar*, ii. 10). What was this but in effect trial by jury, seeing that the first jurors were witnesses ? Thus came the law of Ethelred, that, at the hundred court, twelve freeholders were to be sworn to present no one untruly ; and after this, men not credible are to go to the ordeal, and if the purgation failed, then by the compurgation (*Ethelred I.* c. iii. s. 5). And afterwards, ordeal and oaths are mentioned together as modes of trial (*Ethelred*, v. 18). So, in the laws of Canute (c. 22), mention is made of men who never failed in oath or ordeal (*Ang.-Sax. Laws*, i. p. 389). And as to men who had failed, and were not credible, the words of the law are, "we have ordained concerning those men who were perjurers, if that were made evident, or an oath failed to them, or were not proved, that they should afterwards not be oath-worthy, but worthy of the ordeal" (*Edward*, 3). So, in the laws of a later reign, "And we have ordained, respecting the single ordeal, for those men who have been often accused, and have been found guilty, and they knew not who shall take them in pledge," &c. (*Athelst.* 7). And then the law of ordeal is carefully and minutely laid down. This is very remarkable, and almost inexplicable ; for it is after Alfred's time (when there were juries), and it looks as if the ordeal had been re-established after trial by jury ; and as though the barbarian mind, unable to solve cases of doubtful character, took refuge in the ordeal, and thus revived the practice of their ignorant heathen ancestors.

The *ordeal* was considered as a religious ceremony. The person, the water, and the iron were accordingly prepared under the direction of the priest, by exorcisms and other formalities, and the whole conducted with great solemnity. For three days before the trial, the culprit was<sup>1</sup> to attend the priest, to be constant at mass, to make his offering, and in the meantime to sustain himself on nothing but bread, salt, water, and onions. On the day of trial, he was to take the sacrament, and swear that he was not guilty of, or privy to, the crime imputed to him. The accuser and the accused were to come to the place of trial, attended with not more than twelve persons each, probably to prevent any violence or interposition; and a production of more than that number by the accused would have amounted to a conviction. The accuser was then to renew his charge upon oath, and the accused to proceed in making his purgation. If it was by hot water, he was to put his hand into it, or his whole arm, according to the degree of the offence: if it was by cold water, his thumbs were tied to his toes, and in this posture he was thrown into it. If he escaped unhurt by the boiling water, which might easily be contrived by the management of the priests, or if he sunk in the cold water, which would certainly happen, he was declared innocent. If he was hurt by the boiling water, or swum in the cold, he was considered as guilty.<sup>2</sup>

If the trial was to be by the hot iron, his hand was first sprinkled with holy water; then taking the iron in his hand, he walked nine feet. The method of taking his steps was particularly and curiously appointed. At the end of the stated distance he threw down the iron, and hastened to the altar; then his hand was bound up for three days, at the end of which time it was to be opened; and from the appearance of any hurt, or not, he was declared in the former case, guilty, and in the latter, acquitted. Another method of applying this trial by hot iron, was by placing red-hot ploughshares at certain distances, and requiring the delinquent to walk over them; which, if he performed unhurt, was considered as a proof of his innocence. These trials by water and fire were called *judicia Dei* (a).

Another method of trial was by the *offa execrata*, or Corsned

(a) Or, as it is called in the *Mirror*, the miracle of God: that is, the priest was to do something which it were impossible to do without a miracle from God; "but Christianity suffered not that they be by such wicked arts cleared, if one may otherwise avoid it" (c. 7, s. 24). Nevertheless, the ordeal is mentioned in the laws of the Confessor; and the only substitute the Normans afforded for the stupid ordeal, was the brutal battle. The persuasions of the clergy, Lord Hale says, were used to the utmost to abolish it, and he thinks it died out in the reign of John; but so tenacious are an ignorant people of their barbarous usages, that it is actually mentioned at the end of the *Mirror* as "an abuse," "that purgations are not allowed by the miracle of God, where other proof faileth" (c. 5, s. 1). That was written in the time of Edward I. As to the Norman substitute for the ordeal, the duel or battle, it was hardly obsolete until the time of Elizabeth; at all events, in civil cases; but in criminal cases, no doubt much earlier.

<sup>1</sup> Leg. Athelst. 23.

*Ibid.*

which was that by which the clergy were used to purge themselves, and which they chose, probably, as the least likely to put the party to any peril. A morsel of bread was placed on the altar with great ceremony and preparation, which the person to be tried was to eat: if it stuck in his throat, this was to be considered as a token of his guilt. Thus, in this instance and that of the cold water, a miracle was supposed to be wrought, to prove the guilt of the person; in those of the hot water and hot iron, the like divine interposition was expected to demonstrate his innocence. Another ordeal was that of *the cross*. This was performed by placing two sticks, one with a cross carved upon it, and one without; and making the culprit choose one of them blindfolded. If he hit upon that which had the cross upon it, this piece of good fortune was looked upon as an evidence of his innocence. These seem to have been the methods of investigating truth in criminal inquiries.

It may be observed, that the Anglo-Saxons made a distinction between manifest or open offences, and such as were not so public; and the degree of punishment was proportioned accordingly (a). It has been observed, that this implied some doubt entertained by themselves of their methods of proof<sup>1</sup> (a); but it may be remembered, that the Romans made the like distinction, and inflicted only half the punishment on *furtum non manifestum*, which they did on that which was *manifestum*.

Trial in civil suits. Next as to civil causes, and the manner in which they were tried. It seems that causes in the county and other courts were heard and determined by an indefinite number of persons called *sectatores*, or suitors of court; and there is no great reason to believe that they had any juries of twelve men, which was an invention of a much later date (b). These *sectatores* used to give their judgment or verdict both upon the matter of fact and of law (c). It may be a doubt whether they ever acted as an inquest to make inquiry of crimes and delinquents, as juries did after the Conquest.<sup>2</sup> In a law of king Ethelred (d), there is a provision

(a) There seems no sufficient authority for this. None is cited by the author.

(b) No authority is cited for this; and it is manifest, from the tenor of the later Saxon laws, and from the traces of the Saxon law to be found in the *Mirror of Justice*, that it is correct only as to earlier and more primitive times. For as early as the laws of Edgar, we find provision is made for the securing of twelve men in every hundred as witnesses of transactions within the hundred; and these men were afterwards, if any question arose, either in a civil or criminal matter, to testify thereof to the hundred (*Laws of Edgar*, c. 3, s. 56). These were in truth juries; for the juries were originally witnesses, determining of their own knowledge; and the object of these laws was to provide that they should have knowledge of all matters within the hundred. Thus it came to be a fixed rule that some of the jurors must come from the hundred, who were called hundredors; and this, which was the case until modern times, shows that the jury arose out of the hundred.

(c) *Sed vide supra*.

(d) This law was, that a mote or court be held in every hundred, and that the twelve senior thanes or freeholders should go out—i.e., be selected out of the hundred, and the sheriff with them, and that they should swear that they would accuse no inno-

<sup>1</sup> Littl. Hen. II. vol. v. 292.

<sup>2</sup> Leg. Ethel. ca. 4.

that there should be twelve *thanes*, or *liberi homines* of superior consideration and parts, whose concurrence was made necessary. It should seem, however, these were rather assessors to the judge of the court, than a part of the suitors, or indeed anything like a jury.<sup>1</sup> By all the monuments that remain of these times, it appears that the number of *sectatores* was various, according to the custom of different places; and perhaps in most instances depended on chance and convenience; but in no case is there the least reason to believe that it was confined to twelve<sup>2</sup> (a). These *sectatores* discharged their office, it is thought, without any other obligation for a true performance of it, than their honour; for it does not appear that they were *sworn* to make a declaration of the truth.<sup>3</sup> It is not improbable that the *thanes* in the counties, the citizens in boroughs, and those who were the *sectatores* in other courts, might determine all causes in like manner as peers of the realm, at this day, determine in criminal cases, without an oath. There is at least a perfect silence as to this subject in the remains of antiquity; and the most we can conjecture is, that they might perhaps solemnly engage to speak the truth in all matters which should come before them, without renewing it in every particular cause.<sup>4</sup>

It is not unsuitable with what has been already said of the modes of proof used by these people, to suppose that they admitted the oath of the defendant in civil causes, when that oath was supported by *compurgators*, who swore they believed what he said to be true. The laws requiring witnesses to all contracts supplied evidence almost in all inquiries about him; but where that was not the case, it seemed consistent enough with the established order of

*cent man, nor conceal any guilty one*, the very oath which is now taken by a grand jury; and there can be no question that this was a jury; for it would be difficult to define a jury in any other way than as a selected body of men sworn to determine judicially. In the times of Edgar, it had already been enacted, that in every hundred there should be twelve men sworn as witnesses (Edgar, 6). And in the *Mirror of Justice*—which, there is no doubt, embodies the Dom-boc of Alfred, and certainly records many proceedings which had taken place in his time—jurors and juries are repeatedly mentioned in criminal cases. As regards civil suits, no doubt the suitor was judged in the county court, a turbulent and tumultuous body, unsuited for the administration of justice; but the necessity for having a selected number of them sworn would soon be recognised; and that, in reality, would be a jury.

(a) On the contrary, as will be seen from the Anglo-Saxon law, and from the *Mirror of Justice*, there is no mention made in the latter of these laws of any judicial function of the hundred court, either in civil or criminal cases, without the number twelve being alluded to; and in the instance just quoted, the author omits the words which show that the twelve men were jurors. It is evident, indeed, from his citation of Hicke, instead of the laws, that he took his authority at second-hand, and had not himself much studied the Saxon laws. He is equally incorrect, it will be seen, in the next statement, as to the suitors not being sworn; whereas, as will have been seen, mention is repeatedly made of those of the suitors being sworn who were really to determine, as jurors or witnesses. No doubt these decisions might be ratified by the voice of the whole body of the hundred, and in the earlier state of the Saxons this general voice might have been the only mode of decision. But it is manifest, from the later laws, that the danger and mischief of this had been made apparent, and that, therefore, *sworn men* were delegated really to determine.

<sup>1</sup> Hicke's Thes. Diss. Ep. 34.<sup>2</sup> *Ibid.* 33.<sup>3</sup> *Ibid.* 42.*Ibid.* 42.

living in those times to allow credit to a man's oath, *when* supported by the concurring testimony of others to his credit (*a*). The small districts into which the people were divided, and the consequent relation which by law they bore to each other, furnished abundant opportunities for a man's character to be known, and declarations of his neighbours concerning his credibility might be received with no small degree of confidence.

It cannot be dissembled that some learned men have been of opinion, that the trial by jury was in use among the Saxons; and this point, like some others, had been maintained with great pertinaciousness by those who have laboured to prove the antiquity of our juridical constitution.

This opinion may, probably, have been founded on the similitude between *sectatores* and *jurors*, an appearance which, on a superficial view, may indeed deceive (*b*). However, it may be laid down with safety that the trial by jury did not at this time exist; and if the reader will suspend his judgment till he comes to those times when the trial by jury was really established, he will then see distinctly the essential difference between *sectatores*, *compurgatores*, and *juratores*, and will agree with us in declaring that the frequent mention of *sectatores* is no proof of *juries*, properly so called, being known to our Saxon ancestors.

Thus have we attempted to give a sketch of that system of jurisprudence which subsisted among the Saxons. The materials which furnish any knowledge of it are so few and scanty, that it is with the utmost difficulty anything consistent can be collected from

(*a*) No doubt; and the practice of compurgation was the origin of "wager of law," in which the defender was examined on oath, with others; and, as Lord Coke says, "this countervailed a jury." But the author failed to see how what he said applied equally to jurors, who differed from compurgators simply in this, that the latter were called by the defendant to swear that they believed him innocent, and the former by the court, to swear whether they believed him guilty or innocent—both swearing equally upon their own knowledge. For this reason the Saxon laws, it has been seen, made provision that all transactions should be before some sworn men of the hundred, who should afterwards decide disputes arising out of the transactions they witnessed—*i.e.*, as jurors; for jurors were witnesses. Hence it was that, as the jury arose out of the hundred, and were supposed to be witnesses, and determine upon their own knowledge, it was an inflexible rule or custom, until abolished by statute, that there must be some hundredors upon a jury. And to this day, in matters of a public nature, juries may decide of their own knowledge.

(*b*) As already shown, the jurors were sworn suitors, and the suitors who really decided cases were sworn, in the later Saxon times. The author had misunderstood the provisions in the laws as to the witnesses, forgetting that, in the infancy of trial by jury, the jurors were witnesses, and determined upon their own knowledge; and he had failed also to see how one institution grew out of another in the course of experience. Thus, the original course, no doubt, was to put the defendant to purge himself by his own oath; then he was called upon to add the oaths of others; and if he failed to find a sufficient number to swear in his defence, then a certain number were sworn to determine the case. Both compurgators and jurors were simply suitors sworn; and there is no authority in the Saxon laws for saying that the hundred, after these laws were made, decided cases without some mode of inquiry by sworn men, either as compurgators or jurors. The only difference between them was, that the compurgators swore to their belief in the man's innocence, and the jurors swore to their belief that he was guilty or innocent, as the case might be—both equally swearing from knowledge.



them (a). This must give rise to a variety of opinions, according as persons are biassed by prejudices and different turns of thinking. Perhaps, after all, the clearest opinion that can be formed respecting such distant and obscure times, is not worth defending with much obstinacy.

Of this the reader will be able to judge when, in the course of this history, he finds institutions either so abundantly superinduced upon the original groundwork, or so entirely substituted in the place of it, that very little remains of the Saxon jurisprudence can be traced even in the earliest times of our known law, after the Conquest (b). The parts which alone survived that revolution seem to have been the methods of trial, some notions of criminal law, and the scheme of police. The others were gradually superseded, and at length are no longer known.

It remains now to inquire what steps were taken by the Anglo-Saxons in collecting and improving their laws (c), and what monuments they left of their legal polity.

(a) Unfortunately our author was not at all aware of the materials which existed, nor was he sufficiently acquainted with those of which he was aware. Instances have already been adduced which show that he had derived his knowledge of the Saxon laws at second-hand, and had not studied them himself; and he wholly ignores the *Mirror of Justice*, which, as has been shown, contains a great deal of matter which obviously belongs to the Saxon age, and affords much information as to the Saxon system. No doubt it was rude and imperfect, and in its best time only a striving after better things; but in these attempts lie much of the interest of legal history, and in their criminal system the Saxons had made great advances. Our author had derived a very imperfect idea of the Saxon system, because he had derived it entirely from their written laws, and had missed the valuable evidence we have of their unwritten laws. It is in these, the unwritten laws of a nation, in its earlier stages of advance, that the alterations suggested by practical experience are more usually made, and therefore the course of progressive improvement is more distinctly marked. The author had failed to realise this progressive improvement, and his idea of the Saxon system is therefore imperfect.

(b) This is very true. It may indeed be said that no institutions peculiarly Saxon have survived; for although trial by jury, especially in criminal cases, virtually came to us through the Saxons, it would be an error to suppose that the principle of it was exclusively Saxon; and in substance it was known to the Romans; though no doubt it was not fully developed, until its union, so to speak, with the free popular element in the Saxon institution of the hundred court, out of which it really arose. And the whole of our criminal system of procedure, with its presentment by grand jurors, is distinctively Saxon; but this is all. The barbarous practice of the ordeal did not survive the reign of John. The practice of compurgators soon became obsolete in criminal cases, and the practice of wager of law in civil cases, which arose out of it, had been obsolete for ages long before its abolition, although its legal existence was an inconvenience. The system of "frankpledge" also became obsolete. Nothing except the criminal system of the Saxons survived civilisation.

(c) The author rightly speaks of these collections as confined to the laws of the Saxons. This may be the proper place in which to give some general notice of those written collection of Saxon laws to which the author here alludes. It is to be especially observed that these were by no means complete codes or bodies of law, containing all the laws existing in the country. On the contrary, it can be shown from the laws themselves—and this is the first and most important point to be observed in them—that they did not contain all the law, nor the most important part of it, the law of the most important institutions in the country. For, on the one hand, throughout these laws there are none establishing any institutions at all; as, for instance, the municipal or the manorial, nor the divisions and organisations of the country, as counties and hundreds; and, on the other hand, there are constant allusions to some of those divisions and institutions as already existing. For instance, the earliest of



We are told that the great and good king Alfred, besides the regulations he made for the better order and government of his people, seeing how various the local customs of the Alfred's Dom- boc. kingdom were, made a collection of them, and out of them composed his *Dom-boc*, or *Liber Judicialis* (a). It seems this

these laws make mention of the ecclesiastical organisations and endowments, for they make mention of the property of the church, and of bishops, and of priests (*Ethelbert*, 1), and church scot (*Ina*, 61), and tithes (*Edgar and Ethelbert*). And so of the civil organisations—one of the earliest of their laws make mention of counties, while not mentioning their formation. "If any one demand justice before a shire man or other judge,"—which last, no doubt, means hundredor (*Ina*, 8, 36). In the same laws mention is made of tens, which implies hundreds (*Ina*, 54). This was long before Alfred, who by a popular error is supposed to have established counties, hundreds, and tithings. So, mention is made of the manorial institution,—that is, of serfs or villeins, which implies its existence. "If any one go from his lord without leave, and steal into another shire, and he be discovered, let him go back" (*Ina*, 22, 39). This is a rough translation of an imperial edict as to the coloni; it comes between two clauses as to ceorls (churls) or husbandmen. In the Latin version, ceorl is translated "coloni," added to which there is another clause speaking of ceorls having meadow in common. All which points plainly to the state of villenage and the existence of manors. So mention is made of reeves, sheriffs, shire-reeves (*Laws of Ina*). Mention is next made of "borhs" (burghs), and pledges (*Ina*, 1). All this was before the time of Alfred, who is supposed to have been such a remarkable legislator, but whose laws, on the contrary, are very inferior to those of Ina. There is little at all new, and nothing which can be called original; and they commence indeed by a preface in which the king states that he had gathered from the laws of Ina and Ethelbert those which he thought best, and had added little of his own (*Laws of Alfred; Anglo-Saxon Laws*, p. 59). These laws established nothing, unless it were the right of sanctuary in a church (c. 5). They make mention of royal manors or farms (c. 8). They likewise mention the fole mote or court of the county or hundred (c. 22). They contain an enactment as to bocland (already quoted), implying that the distinction of such land was already known and established (c. 41); and there is no previous law about it. It may here be mentioned that these "laws" were the Saxon, called "dooms," and that thus the laws of Alfred are called "Alfred's dooms." So Edward's "dooms" or laws; they allude to bocland and folcland (the first time the latter is mentioned), and to serfs and sheriffs, and requires that each sheriff have a court once a month. So of the "dooms" or laws of Athelstane; the first thing new is the ordinance for the payment of tithes (I. 1). The next is that if a lord denied justice, the king might be appealed to (II. 3). So allusions are made to trial by ordeal as already established (*Edw.*, 3; *Ath. I.*, 4-6). And there are specific regulations about it. So as to the county court and hundred court, which had been mentioned as existing in previous laws, it is provided that the county court shall be held twice a year, and the hundred court once a month (*Edgar*, 5). So, in the laws of Canute, there is a requisition that every man be brought into a hundred and into a tithing (c. 20). It would be difficult to find anything established or constituted in the Saxon laws (except, indeed, the payment of tithes and church scot, and "Rome-fee," or the "hearth-penny" to St Peter (*Laws of Ethelred, Edward, Edgar, and Canute*). With these exceptions, all the provisions in these laws are matter of mere regulation of existing institutions, and for the most part relate either to more barbarous usages, long since obsolete, or, on the other hand, to pious duties and religious obligations.

It is obvious, then, that these successive collections were not complete codes of law, nor even of the Saxon law—that is, of the whole of the law they had—nor even collections of their laws, in the sense of all their laws, but they were only collections of their written laws; that is to say, of the *new* laws they made to alter, or regulate, or enforce laws already existing, or institutions already established. Each king put forth a kind of edict, or collection of edicts, on such matters as appeared to require to be altered or enforced, and thus they afford only a kind of indirect and incidental evidence of the system of law then existing, which is not embodied or codified in these laws, but, on the contrary, is only to be collected therefrom by close examination and careful induction.

(a) It did not occur to the author that this might be the Doms or Laws of Alfred

was intended as a code for the government of his whole kingdom,

above mentioned ; and which, it will be seen, were only a compilation from a former collection of general laws better than his own. The name of Alfred has become associated with the revival of law and literature, but it is manifest that his merit must have been more in the administration of law than in legislation ; and it is remarkable that, although the chroniclers speak of him in terms of high eulogy, they do not mention his laws, or those which pass under his name as the Anglo-Saxon Laws, nor the "*Dorn-boc*," or *Liber Judicialis*, which is spoken of by the author in this passage. And the only mention made of his legislation is mistaken, and has given rise to the erroneous notion that Alfred divided the country into hundreds and tithings, an error into which the author had fallen. The notion is derived from a passage in William of Malmesbury, but it was perhaps misunderstood, and, at all events, it was corrected by Lord Coke. The chronicler says most truly that Alfred perceived that "literature had gone to decay all over the island, because *every one was occupied in the defence of his life*, and so had no time to devote to books," a sentence which *speaks* volumes as to the barbarous condition of the country at the time, and the entire insecurity of life and limb which existed ; and the impression to be derived from it is confirmed by the earlier Anglo-Saxon laws, which are full of penalties against the most brutal bodily injuries. Hence, it is plain, it was the policy of Alfred to restore literature by establishing security of person, and with that view to restore the reign of law—a most remarkable illustration of the inseparable connexion between law and civilisation, and the absolute necessity of peace and order as agents of civilisation. With this view, the chronicler says, "he appointed centuries, which they call hundreds, and decennaries, that is to say, tithings, so that every Englishman living according to law must be a member of both, and if any one was accused of a crime, he was obliged immediately to produce persons from the hundred and tithing to become his surety, and whoever was unable to find surety must dread the severity of the law," *i. e.*, he had to undergo either the ordeal or some form of trial. And if any one who was impleaded made his escape either before or after he had found surety, all persons of the hundred and tithing paid a fine to the king (*William of Malmesbury*, B. 2, c. 4). Now, comparing this carefully with reference to contemporary history, it will be found that the true meaning of it, or, at all events, all that is true in it, is, that Alfred *adapted* the institution of tithings and hundreds to the object he had in view, by founding on it the Saxon institution of frankpledge, making all the inhabitants pledges for each other, a system the principle of which remains to this day, having been adopted by the act of George I., which made the hundred liable for damage done by rioters. To suppose that he *instituted* hundreds and tithings is a great error, since they were known to the Romans long before his time, and the truth is, as Lord Coke explains, he restored or renovated the institution, though even as to that it is remarkable that these things are not mentioned in the laws until Edgar. Neither Malmesbury the chronicler, nor Asser, his biographer, make any mention of the laws which pass under his name, but they both concur in one statement, that he was a strict inquirer into the sentences passed by his judges, and a *severe corrector of such as were unjust* (*Ibid.*) This statement—which is far stronger and more pointed than Asser's—is remarkably exemplified in the severe sentences of Alfred recorded in the *Mirror of Justice*, a book which, although written in its present form in the reign of Edward I., bears internal evidence of having been founded upon one originally written soon after the reign of Alfred, since almost all the names of judges or parties mentioned are unmistakably Saxon, and the names of judges under Edward are known, and were all Norman ; and, moreover, it professes and purports to record what took place under Alfred, and to give a kind of comparative account of the law as it existed under Alfred and under Edward. In this respect, then, it is one of the most interesting of the sources of our legal history. And it is curious that the author should not have mentioned it here, especially as he mentions an obsolete and doubtful book, of which all trace has been lost, unless by it is meant either the collection of laws which passes under Alfred's name, or the original of that very treatise which is now under notice, and which may have been called Alfred's *Liber Judicialis*, or Book of Dooms. And for this latter supposition there is great reason, for the treatise in question bears upon the face of it evidence that it *was* founded upon an ancient book of the age of Alfred, and purporting to record a number of "Alfred's dooms"—that is, of judgments pronounced by Alfred or by judges under his authority ; and these dooms appear all to have been preserved and incorporated in the work in question, and afford such valuable and remarkable illus-

and it obtained, with great authority, during several reigns, being

trations of the legal history of the period, that they may properly and usefully be here extracted; that is to say, all those passages which bear traces of being as old as Alfred. The treatise begins with a statement that the realm was divided into shires, the names of which are given, and in which it is remarkable that Warwickshire is spelt in the Saxon way, Euerwickshire. The Roman origin of our territorial divisions and civil institutions is betrayed in the statement that eighteen of the shires had been committed to counts or comites (called by the Saxons earls), and therefore had been by the Romans called, comitates, as each had been committed to one of the comites; and it is stated that, "so at this day these shires are called in Latin 'comitatus,' and that which is *without* these counties belongs to the English by conquest"—a remarkable statement for more reasons than one; it may explain how it is that some counties end with the word shire and others do not, and next, it shows that the Saxons, in the main, preserved the old institutions and divisions. It then mentions the division of the country into centuries or hundreds, and tithings or decennaries,—not ascribing it to Alfred. Then it states that, for the estate of the realm, king Alfred caused the earls to meet, and ordained that twice in the year, or oftener if need be, they should meet at London; "and that by this estate many ordinances were made by many kings until the time of the king that now is," *i.e.*, Edward I.; and then it states the substance of these laws, which are here stated, only as far as it appears from the Saxon laws, was really the law of the time of Alfred. The sheriffs were ordained to defend their counties, and bailiffs, in the place of centiniers or hundredors. And the sheriffs and bailiffs caused the free tenants of their bailiwick to meet in their counties and hundreds, at which justice was so done that every one so judged his neighbour by such judgment as a man could not elsewhere receive in the like cases, until such time as the customs of the realm were put into writing and certainly established. And although a freeman commonly was not to serve without his assent, it was assented to that free tenants should meet together in their counties, hundreds, and the lords' courts, if they were not especially exempted to do such suits, and there judge their neighbours. And that right should be done from month to month in the counties, if the largeness of the counties required not a longer time; and that every three weeks right should be administered in other courts; and that every free tenant was bound to such rule, and had ordinary jurisdiction. The turns of sheriffs and view of free pledges were ordained; and it was ordained that none of the age of fourteen years or above, was to remain in the realm above forty days, if they were not first sworn to the king by an oath of fealty, and received into a decennary (B. 1, s. 2). Then afterwards (s. 15), that county courts were held monthly, and the judgment was by the suitors, and the other inferior courts were the courts of every lord, to the likeness of hundred courts, "where right was to be administered without delay" (sec. 15). And again, "the sheriffs by ancient ordinances held meetings twice in the year in every hundred," where all the freeholders within the hundred were bound to appear, and because sheriffs, to do this, made their turn of the hundreds, and such appearances are called the sheriffs' "tours,"—where it belongeth to them to inquire of all *personal offences* done within their hundreds, and of all wrongs done by the king and king's officers, and of wrongs done to the king (sec. 16). Then "it was ordained that there should be in each hundred a view of frankpledge, that is, to show the frankpledges, and if all the frankpledges had their dozens entire," whence it appeared that they were not in decennaries but in dozens, that is, that the number of each was not ten but twelve, which was, it will be observed, the number of a jury. And this meeting of the hundred was called the "leet" (sec. 17), and made presentment of nuisances, &c. Then there is this passage, which seems to show that these "leets," or assemblies, were the origin of juries: "and though the bailiffs cannot determine any action at the leet, if any be grieved by wrongful presentment, it is lawful for the bailiff or steward, by twelve of the more discreet men, to inquire of the truth, though no *decennary* or *juror* is not attestable with less than two juries"—treating the decennaries and grand jurors as identical (sec. 17). "And if any one proffer himself to swear fealty to the king, he is to be pledged in some frankpledge and first in the decennary" (*Ibid.*) All this is evidently of the time of Alfred, for it relates to the very constitution of frankpledge which he first established, and it connects it with the jury system. In a previous passage it is said, "The panel (of jurors) are to be of decennaries; for sheriffs at their tours, or bailiffs at their view of frankpledge, have power by authority of their office to send for the people, which none other have without the king's con-

referred to, in a law made by king Athelstan, as an *authoritative* guide<sup>1</sup> (a).

sent, and that is for the keeping of the peace, and for the right of the king and the common people" (sec. 13). All this, again, relates to frankpledge, and therefore is of the age of Alfred, and connects it with juries, and identifies decennaries with jurors. And there are numerous evidences that the book had its basis in a work composed after Alfred's time. There is mention made of a judge who is afterwards said to have been hanged by Alfred (sec. 1). There is mention made of a case decided in the time of king Edmund (Book ii., sec. 17). There are many instances of indictments, in which, without any exception, all the names are Saxon (sec. 13-22). The part of the work, however, which most unmistakably points to the time of Alfred, and most conclusively identifies it with the "doom-book" above referred to by the author, is that in which, literally, Alfred's dooms are set forth. "It is an abuse that judges and their officers who kill men by false judgment, are not destroyed as other murderers, which Alfred caused to be done, who caused forty-four judges to be hanged in one year as murderers for their false judgments." This is, as other facts show, wilfully false. "He hanged Segnor, who judged Selve to death after sufficient acquittal. He hanged Cadwine, because he judged Hackwy to death, without the consent of all the jurors, and whereas he stood upon the jury of twelve men, and three could have saved him against the nine. Cadwine removed the three, and put others upon the jury, upon whom Hackwy put not himself. He hanged Markes, because he judged During to death by *twelve men who were not sworn*. He hanged Seafaule, because he judged Olding to death for not answering. He hanged Thurston, because he judged Thurnger to death by a verdict of inquest taken *ex officio* without issue joined. He hanged Athelstane, because he judged Herbert to death for an offence not mortal. He hanged Rombold, because he judged Lischild in a case not notorious, without appeal, and without indictment. He hanged Freburne, because he judged Harpin to die, *whereas the jury were in doubt in their verdict*; for in doubtful cases one ought rather to save than to condemn. He hanged Hale, because he saved Tristram the sheriff from death, who took to the king's use from another's goods against his will, forasmuch as between such taking from another against his will, and robbery, there is no difference. He hanged Bermond, because he caused Garbolt to be beheaded by his judgment in England, for that for which he was outlawed in Ireland. He hanged Alflet, because he judged a clerk to death over whom he had not cognisance. He hanged Muclin, because he hanged Helgaire by command of indictment, not special. He hanged Saxmund, because he hanged Bunold, in England, where the king's writ runneth, for a fact which he did in the same land where the king's writ did not run. He hanged the suitors of Calevot, because they had adjudged a man to death in a case not notorious, although he were guilty thereof; for no man can judge within the realm but the king or his commissioners, except those lords in whose lordships the king's writ doth not run. He hanged the suitors of Dorchester, because they judged a man to death by jurors in their liberty, for a felony which he did out of the liberty, and whereof they had not the cognisance by reason of property. He hanged the suitors of Cirencester, because they kept a man so long in prison that he died in prison, who would have acquitted himself by foreigners. In his time the suitors of Doncaster lost their jurisdiction, besides other punishments, because they held pleas forbidden by the customs of the realm to judges and suitors to hold. In his time, Colgrin lost his franchise of enfangenthief, because he could not send a thief to the common gaol of the county, who was taken within his liberty for a felony done out of the liberty. In his time, Buttolphe lost his view of frankpledge, because he charged the jurors with other articles than those which belonged to his view. In lesser offences he did not meddle with the judgments, but removed the judges, &c. In his time every plaintiff might have a commission, and a writ to the sheriff, to the lord of the fee, or to certain justices, upon every wrong done (Book 5, sec. 1). Now, it is manifest that all this is recorded of the time of Alfred; and it shows plainly that trial by jury was fully established in criminal cases, and, no doubt, in civil cases also.

(a) Had the author read the laws he would have found that there was no foundation for the statement. Athelstane makes no allusion to Alfred's laws, but simply says that such a fine shall be paid, as the doom-book may say; which may mean his own, or any other, and there were express provisions on the subject in most of the laws, as in Edward's, for instance: and not especially in those of Alfred.

<sup>1</sup> Ca. 5.

However, this work, valuable as it was, had probably the defects of all original attempts. On that account, as well as on account of the irruption and settlement of the Danes, and the consequent prevalence of their customs, it was found necessary in the days of king

Edgar to revise this compilation, or make another more full, and more suitable to the then state of the law. But this undertaking was left unfinished; so that the grand

design of making a complete code of English law fell to the part of Edward the Confessor (a), who is said<sup>1</sup> to have collected from the Mercian, West Saxon, and Danish law, a uniform body of law to be observed throughout the kingdom.<sup>2</sup> From this circumstance, the character of an eminent legislator has been conferred on Edward the Confessor by posterity; who have endowed him with a sort of praise nearly allied to that of Alfred: for as one is dignified with the title of *legum Anglicanarum Conditor*, the other has been called *legum Anglicanarum Restitutor* (b).

It is said, that the *Dom-boc* of Alfred was in being about the time of Edward IV.; but we hear nothing of the fate attending the volume compiled by Edward the Confessor (c). As to the

(a) Had the author read the laws of Canute he would have seen that his collection is far more full than any other; but, as already mentioned, there was no attempt by any one to embody or codify all the laws, and these successive collections were only collections of written laws. There is no contemporary evidence that the Confessor ever made such a code as is supposed, and the idea of such a code was far beyond his age. The notion, no doubt, arose out of a misapprehension of the cause of the great regard shown by the people for the customs of his time.

(b) There is no more foundation for the one title than the other, nor an atom of contemporary authority for either. On the contrary, contemporary authority points rather to Edgar as the author or restorer of our laws, and his laws are far superior to those of Alfred, and as good as those which have come down to us as those of the Confessor. In the collection of the laws of the Confessor, made by royal authority, only a few years after his death, it is said: "*Et sic auctorizati sunt leges regis Edwardi; quæ prius adinventæ et constitutæ fuerunt tempore regis Edgari, avi sui (Ang.-Sax. Laws and Inst., v. i. p. 458).*" Popular ideas are often not supported by authentic contemporary authority. In the next sentence, the author shows he assumed that Alfred's "dooms" had not come down to us, and in the next he shows that he equally assumed the non-existence of any of the laws of the Confessor. But on both points it will be seen he was in error.

(c) Because there was no such code. If there had been, it must have been known of in the next reign, and it would not have been necessary for the Conqueror to order a compilation of the Confessor's laws to be made, as he undoubtedly did, according to all historians, in the fourth year of his reign. This collection has come down to us, and it is headed thus: "*Post quantum annum adquisicionis regis Willielmi consilio baronum suorum, fecit summoniri per universos patriæ comitatus Anglos nobiles sapientes, et in lege sua eruditos, ut eorum consuetudines ab ipsis audiret. Electis igitur de singulis totius patriæ comitatibus 12 jurejurando imprimis sanxerunt ut quoad possent recto tramite incedentes, legum suarum ac consuetudinum sancita edicerent; nil pretermittentes, nil addentes, nil prevaricando mutantes*" (*Ang.-Sax. Laws, v. i. p. 442*). It would be impossible to imagine anything more apparently authentic than this collection. These laws are general in their application to the whole kingdom, with several special exceptions which are expressly mentioned. One of the first shows that the prerogative of the king to administer justice in the supreme courts was recognised, for it runs thus: "*Ubicumque justitia regis vel alia quælibet justitia cujuscumque sit, tenuerit placita,*" &c. (*Ibid. p. 443*). It appears that the ordeal was still resorted to, and it is laid down, "*assit ad judicium minister episcopi*

<sup>1</sup> Hoveden, Hen. II. Leg. St Edw. 33 to 33; Lamb. p. 149.

<sup>2</sup> 1 Bla. 66.

nature of the work ; it seems probable, that as the Danes had now become incorporated into the body of the people, their laws were melted down into one mass with the Mercian and West Saxon ; and all together composed a set of laws to govern both peoples. This, most likely, was done with equable qualifications of all these laws, so as to render submission to them, by both nations, neither strange nor oppressive. It should seem, there was throughout that book a constant intimation what was Saxon, Mercian, or Danish ; as we find in the laws of William the Conqueror, which were designed to make certain alterations in those of Edward, frequent mention of them by their respective names, as different subsisting laws.

As the collection of Edward the Confessor comprised in it the

cum clericis suis, et justicia regis cum legalibus hominibus provincie illius, ut videant et audiant omnia aequae fiant et quos salvaverit Dominus per misericordiam suam et justitia eorum, quietis int et liberi abscedant ; et quos iniquitas et injusticia sua condemnaverit, justicia regis de ipsis fieri faciat justiciam ” (c. ix., p. 446). It appeared that there were civil and criminal courts in the hundreds and the counties, and also courts-baron in manors. There is little in the collection relating to anything except the rights of the church and the administration of justice ; there is no reference to the rights or customs of the people, except in a clause referring to their right to assemble in their counties in full “folk-mote,” and to elect a sheriff, and discuss public affairs (which is omitted in some copies). It is remarkable that though there is a recognition of the rights of the church, there is no recognition of the rights or institutions of the laity. It is difficult indeed to imagine any popular enthusiasm excited by anything in this collection, except as to the county assemblies ; the main importance of which, however, would be as necessary for the maintenance of the rights and customs of the people. And though this collection is clearly, as far as it goes, authentic, it is not surprising, therefore, that people should have doubted whether these could be indeed the laws of Edward the Confessor, about which the people were so anxious. But a little attention will solve the difficulty, and show that it arose from an error, already pointed out, in confounding the written laws with the unwritten ; and an attentive reference to contemporary history in the chronicles will show that what the people were chiefly anxious about was the maintenance of the “customs” of the Confessor—that is, the customs which existed in his time, which were erroneously imagined to have been put into writing by him, a notion for which there is no foundation. What these customs were, and that they were not written in his time, will appear from the laws of the Conqueror, which commence thus, “Iste sunt leges et consuetudines quos Willielmus rex post adquisicionem Anglie omni populo Anglorum concessit tenendas eadem, quas predecessor suus Edwardus, servavit.” And then among the “laws and customs” are these, “Coloni et terrarum exercitores non vexentur ultra debitum et statutum, nec licet dominos remove colonos a terris dummodo debita servicia persolvint.” This, which was a reproduction of a law of Ina almost, the earliest Saxon king, and of an imperial edict in the time of the Roman occupation (*vide* Introduction), was a recognition of the right of the great body of the agricultural tenants all over the country, to retain their tenements so long as they rendered their services, and it would be impossible to conceive anything more vitally important to the great body of the people. There was another custom recognised, the right of inheritance, and the equal division of land, “Si quis paterfamilias casu aliquo sine testamento obierit, pueri inter se hereditatem paternam equaliter dividant.” And there was another as to the local administration of justice in the courts of the county, or hundred : “Nemo querelam ad regem deferat nisi ei jus defecerit in hundredo vel in comitatu” (c. 43), which was a reproduction of similar provisions in Saxon laws. These two customs may have strongly interested popular feelings, through the medium rather of their prejudices than their real and solid interests ; but the first-mentioned one, as to the rights of the agricultural tenantry all through the country, must have been of vital importance to the great body of the people, and a reference to these “customs” thus recognised by the Conqueror as existing under the Confessor, will amply explain the anxiety of the people about the customs of the Confessor’s time.

whole law of the kingdom, it contained not only the unwritten customs, but the laws and statutes made by the several kings. By the loss of this volume, we are left very much in ignorance as to the extent, scope, and nature of these customs. It is not so with the written laws of these times; for we have many of these still remaining. These remains of Saxon legislation give us some insight into the nature of their jurisprudence.

As laws, if not made to create some new regulation, are designed to restrict, amend, or enlarge some pre-existent custom, or law; they always enable us to make some conjectures respecting the subject upon which they are intended to operate. From these Saxon laws we may pronounce, that matters of judicial inquiry were treated with great plainness and simplicity. Like the laws of a rude people, they are principally employed about the ordering of the police; and accordingly contain an enumeration of crimes and their punishments (*a*). As this makes the greater part of the

(*a*) No doubt this is so, and these laws are, for the most part, the mere records of the barbarous usages of a barbarous race—these written laws being the peculiar laws or usages of the Saxons themselves, which they brought here, and therefore of the rudest and most barbarous character. It has been already shown that they established no institutions, though there are recognitions of existing institutions (as, for example, the manorial and ecclesiastical); which were entirely of a rural character, and had little applicable to cities, or relating to municipal institutions; and as already shown, the earlier conquests of the Saxons would be in the rural districts, their progress would be gradual, the cities would be the last subdued, and in the rural districts the amalgamation of the races would be the most slow, and the barbarous usages most deeply rooted. Moreover, it is to be remarked of these laws that the earlier of them were local, and only related to particular kingdoms of the Heptarchy. Those of Ethelbert, for instance, relate to the province of Kent; those of Ina and Alfred to the West Saxons. It was not until after the Danish invasion that there is any indication in the laws of a general application to all England; and it is in the laws of Athelstane that first there are expressions which denote that they have that character (*Anglo-Saxon Laws*, p. 225). These laws contain internal evidence that they were framed for the whole realm, as they establish a general coinage and currency, enumerating the cities where there are to be mints, and these include all the chief cities in the country, at least as far north as London; these laws likewise include the customs of London. These laws, however, seem to indicate that the more northern and central counties were under the Danish rule, and the laws of Ethelred are said to have been made in Mercia, according to the laws of the English, and he is called King of the English (p. 305). It is only in the laws of Canute for the first time declared that they were made by the king of all England and king of the Danes (p. 359), and to be observed over all England (p. 377); and these establish one general law for all the races with special exceptions, which are specified. Thus, then, up to the time of Athelstane these laws were merely local. Athelstane was the first king of all the English, and his were the first laws for the whole of the Saxon race, but his dominion only extended over half England; and Canute was the first monarch who reigned over all England, and who framed a collection of written laws for the whole of the population of the country. His, therefore, was the first compilation of laws which could be considered general or national: those of Alfred were entirely local; and, as to the supposed compilation by the Confessor, it has already been shown to be a mere fiction. It may be of interest here to select from these collections all the laws which appear worthy of mention. First, as to the established church: as already mentioned, the earliest of these laws mention bishops and priests, and church property, and further disclose that the bishops had seats in the national or local councils, for the laws of Ina commence with a statement that they were made with the council of the bishop and his eldersmen, and the rest of the distinguished members of the witan (*Anglo-Saxon Laws*, 103). These laws ordain payment of church scot (*Ibid.* 105; *Ina*, 4), as do subsequent laws (*Edgar* I., 3; *Ethel.*, vi. 18; ix., 11; *Edgar*, i. 2, &c.;



Saxon laws now existing, it may fairly be concluded that the *Dom-*

Tithes are ordained to be paid in the laws of Edgar (i. 3), and later laws (*Ethel.*, ix. 8; *Can.*, 8; *Ethel. I.*, *Ed. Conf.*, 70); and the hearth-penny, or Peter's pence (*Edgar* and *Ethel.*) The earliest laws command the observance of Sundays (*Ina*, 3; *Can.*, 46; *Athels.*, i. 24; iii. 2; *Ethel.*, v. 13; vi. 22; *Edgar*, i. 5; *Can.*, 14), and mass days (*Alf.*, 43; *Edgar*, i. 5); *Can.*, 14.) Throughout the laws there is an emphatic recognition on the part of the people of their common Christianity; and it is interesting to observe how, under the influence of the church, the laws bear the impress of a spirit of equality, and equal justice, to all classes and races of the people. Thus, through the laws of Ina is to be observed an evident endeavour to put the British on the same footing as the Saxons; the laws are framed generally for both races, and there are special provisions in favour of the British (*Ina*, 33-46). And so as to ranks and classes The laws of Ina commence thus:—"First, we command that God's servants hold the lawful rule; after that, we command that the law and doom of the whole folk be thus held." And almost the first law is, that if a theow, or slave, be made to work on Sunday, he shall be free (*Ina*, 3), and none could be put into slavery but for felony, or stealing (7). There is a general provision for the whole of the people,— "If any one demand justice before a scire-man (shire-reeve, sheriff), or other judge, and cannot obtain it, and the man will not give him satisfaction, let him pay a fine, and within eight days do him justice: if one takes revenge before he demand justice, let him give up what he has taken to himself, and pay damage and a fine" (sec. 9): if any commit forcible ouster, let him give up what he has taken and pay a fine (*Ina*, 10).—laws which were evidently suggested by the Roman law, and aimed at the establishment of the supremacy of law and legal justice over that rough and legal justice which is the great characteristic of a barbarous state of society. The criminal code was, as might be expected, barbarous: a thief could not be punished with death (*Ina*, 12), unless his life could be redeemed, and an habitual thief could have his hand or foot cut off (*Ina*, 18-37). The same laws contained the first of a series of enactments which run all through the Saxon laws, requiring transactions to take place before witnesses, who should afterwards be able to testify as jurors, the jurors at first being witnesses, and proceeding according to their own knowledge. If a chapman traffic among the people, let him do so before witnesses; if stolen property be attached with a chapman, and he have not brought it before good witnesses, let him prove that he was neither party to the theft, nor thief, and pay the penalty (*Ina*, 25); and there are similar provisions in later laws of *Edward I.*, *Ath. I.*, 10, 12; *Edm.*, c. 5; *Edj.*, 6; *Ed.*, 5; *Edg.*, 6; *Ethel. I.*, 3; *Can.*, 24; *Ed. Conf.*, 38. These provisions are important, as containing the first germ of trial by jury. The laws of Ina are the first that deserve mention. The laws of Ina contain an important recognition of the condition of serfdom, as distinguished from slavery,— "If any one go from his lord without leave, or steal himself away into another shire and be discovered, let him go where he was before, and pay a fine" (*Ina*, 39). This comes between two laws relating to "ceorls" (pronounced "churls") or husbandmen, whom the Latin version call "coloni," and who are throughout distinguished from "theows" or slaves, who held no property and could pay no penalty, and as to whom it had been provided that if they ran away they should be hanged (*Ina*, 24). These "ceorls," then, were the "coloni" of the Roman-British period; and the villains or villeins of later times, the originals of our modern copyholders. They held tenements on servile tenure, afterwards secured by custom, the tenure being that of rendering services in the way of agricultural labour or supplies. This tenure, even in those early times, was already distinguished from tenure at certain rent For there is a subsequent law, "If a man agree for a yard of land or more (*i.e.*, for a free tenancy of it, at a rent, as distinguished from the servile tenancy of the ceorls) at a fixed rent, and plough it, if the lord desire to raise the land (*i.e.*, the rent) to him, to service and rent, he (*i.e.*, the tenant) need not take it upon him, if the lord do not give him a dwelling, and let him lose his crop," that is, let the landlord lose it, unless he gives the dwelling as an equivalent for the increase of rent. So Lambard reads it. It is still a principle of our law that if the landlord determine a tenancy at will, after the tenant has sown the land, the tenant shall have the crops, which is called the right of emblements. So much for the tenant's right. Then there are other provisions as to landlord right. "He who has so many as twenty hides, shall leave twelve hides of cultivated land when he wishes to go away; he who has ten hides, shall leave six hides of cultivated land; he who has three hides, shall leave one and a half" (*Ina*, 14, 15). These laws could not refer to the villeins, who could not "go away:" they must have referred to free



*boc* of Alfred and the compilation of Edward the Confessor were mostly filled with the same kind of matter.

tenants at certain rents. And the "ceorls," who were not slaves, though feudal serfs, could acquire property, and could lease other land than that they held in villenage, as they could have cattle, &c. "The ceorl who has hired another's yoke, if he have to pay wholly in fodder, let him do so; if he have not, let him pay half in fodder and half in other goods" (*Ina*, 60). Whence it appears that payments were in kind, and probably the rent was so paid. The ceorls evidently belonged to manors, and held pasture land of the manor in common, as copyholders do still. "If ceorls have a common meadow, or other partible land to fence, and some have fenced their part, some have not, and cattle come in, and eat up their common corn or grass, let those who own the gap compensate the others who have fenced their part, the damage which then may be done; and let them demand such justice on the cattle as may be right: but if there be a beast which breaks hedges, and goes in everywhere, and he who owns it will not, or cannot restrain it, let him who finds it in his field take it and slay it, and let the owner take its skin and flesh, and forfeit all the rest" (i. 42). The point to be observed here, is the recognition and careful protection of the property of "ceorls" or villeins. So, from another of the laws of *Ina*, "A ceorl's close ought to be fenced: if it be unfenced, and his neighbour's cattle stray in through his own gap, he shall have nothing from the cattle; let him drive them out and bear the damage" (s. 4),—which is good law at this day, and has lately been applied in one of our courts of common law (*Singleton v. Williams*, 6 H. & N.) It will be observed that the laws of *Ina* contain the germs or elements of a great deal of good law, no doubt derived from the Roman; and which have been developed in later times, relating to the dealings and transactions of men in the affairs of life. Thus, for instance, in one of the laws of *Ina* we find this, "If a man buy any kind of cattle, and he then discovers any unsoundness in it within thirty days, then let him throw the cattle on his hands, or let him (the other) swear that he knew not of any unsoundness in it when he sold it to him." This law, it will be observed, made provision for a case not provided for by the contract, and it contains a principle which has been adhered to and developed in later times. (See *Burnby v. Bollett*, 16 M. & W.) These portions of law, indeed, were few and fragmentary, and contrast with the rudeness and barbarity of the usages by which they are accompanied; still they show the seeds and germs of something like law. And it is very remarkable that the laws next in order of time are those of Alfred, who, like *Ina*, was only king of the West Saxons, and are greatly inferior to his. Though he had the benefit of *Ina*'s laws, and says he selected from his and others, the only really good laws of *Ina*'s are omitted, and there is nothing in those laws of Alfred's beyond the barbarous usages of the Saxons, except one or two laws already alluded to, and the following "of tearing by a dog:" "If a dog tear or bite a man, for the first misdeed let six shillings be paid, if the owner gives him food; for the second time, ten shillings; for the third, thirty shillings. If, after any of these misdeeds, the dog escape, let the penalty nevertheless be paid. If the dog do more misdeeds, and the owner keep him, let him make amends according to the full sum for wounds" (*Alfred*, 24). The treaty of peace between Alfred and Guthrum applies the practice of compurgation to cases of homicide. The laws of Edward the Elder, the next in chronological order, are thought stricter, far superior, and contain the first germs and elements of civil or criminal procedure. As to civil suits, the sheriffs are to hold courts once a month (*Ed.* 11), and do justice, and give a term to every suit (*Ed.* 1, s. 11); and if any one denied justice to another as to land, he should give him a "term" where he should do justice before the sheriff, or pay a penalty (*Ed.* 2). As to criminal suits, if any one was accused of theft, and no one would be compurgator for him, then he must stand to judgment (6); and men who were not "oath-worthy" or credible, were to undergo the ordeal; but, as much as possible, transactions were to be before witnesses who might afterwards testify as jurors (1). If the accused could bring forward sworn witnesses, or the oaths of credible persons in the county as compurgators, he could do so (1); otherwise, six of the men of the neighbourhood where he was resident. The witnesses were sworn, and were really jurors; for jurors originally gave their verdicts of their own knowledge: the difference between the jurors and the compurgators being, that the latter swore from their knowledge of the character of the accused, and the other from their knowledge of the matter. This verdict or true testimony of sworn witnesses, men of the county, was called "shire-oath" in the Saxon laws, and they were called jurors in other contemporary laws. Thus, in the capitulary for 593, "Si litus de quo inculpatur, ad

The first of the Saxon laws, now in being, are those of king

sortem ambulaverit, mala sorte priserit, medietatem ingenui legem componat, et juratores sex medios electos dare debet"—a phrase borrowed from the Roman law, in which the magistrate was sued "judices dare," i.e., "judices facti," or jurors (*vide Introduction*). The most important parts of the laws of Athelstan, the first which were framed for the whole population and dominion, relate to this subject of procedure. Thus the shire-oath is mentioned, "He who seizes cattle, let five of his neighbours be named to him, and of the five let him get one who will swear with him that he took them rightfully; and he who will keep it to himself—i.e., the claimant—let ten more be named to him, and let him get two of them to give the oath that it was born on his property" (*Athel.* 1, 9). Then there is a provision that transactions take place in the presence of witnesses who might afterwards testify that, as jurors (10); and there are provisions for the ordeal in cases where such testimony of jurors cannot be got, nor sufficient compurgators (*Athel.* 7). So of the laws of Edgar—(those of Edmund have nothing worth noting)—the most important provisions are those on this subject: that he who denied the doom of the hundred, and it was afterwards proved against him, should pay the penalty (*Edgar*, 3); that no one should possess unknown cattle without the testimonies of the men of the hundred (4); that the hundred court be held as before fixed, once a month, and the county court twice a year (*ii.* 5); that witnesses be appointed in every borough and hundred, in every hundred twelve (*Supp.* 5); and that all the transactions be before some of the witnesses, who were first to be sworn to give true testimony of all they did know, and whose testimony afterwards was to be sought in any civil or criminal matters (*Ibid.* v. 10). So, in the laws of Ethelred, there are provisions as to witnesses (*i.* 3; *iii.* 2), and at hundred courts the twelve sworn freeholders were to take oath not to present any one untruly (*Ibid.* 3). The laws of Ethelred, though extremely voluminous, contain nothing original, and are, for the most part, religious precepts or ordinances. As already mentioned, the laws of Canute were the first which were formed for the whole kingdom; and they are the first after those of Ina that deserve the name of a compilation of anything like laws. They are divided into ecclesiastical and secular. The first confirm all former laws as to payment of tithes, church scot, and Rome fee, or Peter's pence, and the observance of Sundays and festivals. There is a distinct ordinance against Sunday marketings and folecmote, unless it be for great necessity; "and let huntings and all other worldly works be strictly abstained from on that holy day" (*Ecc. Laws, Can.* 15). The secular laws, ordained to be observed over all England, commence by laying down a noble principle: "Let God's justice be exalted; and henceforth let every man, both poor and rich, be esteemed worthy of fole-right, and let just doom be doomed to him" (1). And that Christian men be not for too little be condemned to death (2), nor sold out of the land (3), nor that thieves and public robbers perish unless they amend (4). Heathenism was prohibited (5). All manslaughterers were to pay the penalty, or be outlawed (6). One money was to pass over all the nation, without any counterfeit, and no man was to refuse it; and if any counterfeited, he was to have his hands cut off (8). And all weights and measures were to be carefully rectified, and every species of fraud was prohibited (9). Local customs were preserved (12, 14, 15); but the general laws laid down applied equally to all; and whoever was outlawed forfeited his land (16). No one was to apply to the king's court unless he could not get justice in the hundred (17). And twice a year there was to be a county court for the administration of justice (18). No man was to take a distress before he had four times demanded justice—thrice at the hundred court, and once at the county court (19). Every freeman was to be brought into a hundred and tithing (20). Every freeman who was not infamous, and had never failed in oath or ordeal, could clear himself with a single oath; others had to find compurgators, or go to the ordeal (22). No man was to buy without the witness of four men, either of the borough or the hundred (24). And every lord, i.e., of a manor, was to have his household in his own "borh," or borough, i.e., his own court-baron the court of his manor; but if any one accused one of his men of anything, he was to answer in the hundred court (21); the courts-baron only having jurisdiction over the tenants of the manor, and in matters arising between the tenants themselves. House-breaking, and arson, and theft, and murder, were, by the secular law declared not subjects of compensation—that is, they were liable to the penalties of the king's criminal justice (60). The civil offence of forcible ouster, was to be punished by restitution and compensation, and a fine to the king (64). If any one died intestate,

Ethelbert. These are the most ancient laws in our realm, and are said to be the most ancient in modern Europe.

**Saxon Laws.** This king reigned from 561 to 636. The next are the laws of Hlothaire and Eadric, and of Wihtred, all kings of Kent. Next are those of Ina, king of the West Saxons. After the Heptarchy we have the laws of Alfred, Edward the Elder, Athelstan, Edmund, Edgar, Ethelred, and Canute. Besides these there are canons and constitutions; decrees of councils, and other acts of a public nature (a). These are in the Saxon language,

the lord was only to have a heriot; and let the property be distributed among the wife, and children, and relations, to every one according to the degree that belongs to him (71). And where the husband dwelt without claim or contest, let the wife and children dwell in the same, unassailed by litigation. And if the husband, before he was dead, had been cited, then let the heirs answer, as himself should have done if he had lived (73). And he who has defended land (*i.e.*, against all claims) with the witness of the shire, let him have it undisputed during his day, and after his day to sell, and to give to him who is dearest to him: a law in which we see the origin of fines and recoveries—that is, alienations or acquisitions of land by proceedings in a real or feigned suit in a court. It will be seen that these laws are far superior to any that went before, and really deserve the name of a compilation of laws. And it is a remarkable instance of national prejudice that Alfred, who framed no laws worthy of the name, and even overlooked and neglected many which are valuable, and Edward the Confessor, who framed no laws, nor made any compilation of laws at all, should, by reason of false tradition, arising from national feeling, have had the reputation of legislators, while Canute, who really deserved the credit of wise and careful legislation, yet, being a Dane, has had no credit for it.

(a) This is the proper place in which to present a summary of the ecclesiastical laws or institutions of the Saxons, whether gathered from their municipal laws or their ecclesiastical canons or constitutions. As already mentioned, the earliest Saxon laws make mention of an episcopal church as already existing and established, and guarantee its property (*Ethelb.*, 1). There were laws of the Saxons relating to ecclesiastical matters, contained both in the secular and ecclesiastical laws enacted by the kings in their councils, and there were also ecclesiastical canons and constitutions put forth by the prelates, under the sanction of the state, but with only spiritual penalties. The latter are alone alluded to here, but as the author has omitted all notice of the laws of the Saxons relating to ecclesiastical matters, it is necessary here to present an analysis of them. It has already been mentioned that, by the Saxon political constitution, the bishops had seats in the national council, and all the laws are prefaced by a formal declaration of their consent (*Laws of Ina*). “With the counsel and teaching of the bishops and ealdermen and distinguished ‘witan’” (*A.-S. Laws; Laws of Alfred*). “Many synods assembled among the English race after they had received the faith of holy bishops and other exalted ‘witan’ (wise men), and they then in many synod-books wrote dooms (or laws): And I, Alfred, gathered them together, and, by counsel of my ‘witan,’ commanded those to be written which seemed to me good” (*Ibid.* 19). Laws of Athelstan: “I, with the counsel of the archbishop, and of my other bishops,” &c. (*Ibid.* 193). All this was established in the great synod, at which the archbishop, with all the noblemen and “witan,” &c. (*Ibid.* 215). So the secular laws of Edmund: “I, with the counsel of my ‘witan,’ both ecclesiastical and secular” (*Ibid.* 247). So Edgar: “With the counsel of my ‘witan’” (*Ibid.* 263). So Ethelred: “The ordinances that the king and the ecclesiastical and lay ‘witan’ have done” (*Ibid.* 305). So much for the authority of the secular laws of the Saxons, and the union of ecclesiastical and lay elements in their constitution. Next, as to the matter and substance of their secular or municipal laws, so far as they related to spiritual or ecclesiastical things. The laws of Ina began by upholding the rule of the bishops: “First, we command that all God’s servants hold their lawful rule” (1). Next, baptism was enforced with a penalty: “Let a child within three days be baptized,” &c. (2). Sunday working was prohibited (3). Church scots were ordained to be paid (4). The right of church sanctuary was established (5). The laws of Alfred first upheld episcopal jurisdiction: “If one pledge himself to what is lawful, and belie himself, let him suffer what the bishop may prescribe” (1). The right of sanctuary was

and were some of them collected, in one volume in folio, by Mr Lambard, in the time of queen Elizabeth, and published under the title of *Αρχαιονομία*; *sive, de priscis Anglorum legibus*. To this additions have since been made by Dr Wilkins. These remains compose, all together, a body of Anglo-Saxon laws for civil and ecclesiastical government.

We have refrained from mentioning some laws which have gone also upheld (2). So, as to confession, "If any man seek a cloak for any of those offences which had not been before revealed, and then confess himself, in God's name be it half forgiven (5). The abduction of a nun was made penal (8). Fighting before a bishop was made penal (15). Pledges by baptismal vows were enforced (33). Days were given as holy days for the celebration of masses (43). If a priest killed a man, all his goods were to be forfeited, and let the bishop secularise him; then let him be given up, unless the lord will compound for him (21). So the laws of Alfred and Guthrum declare that they established secular laws for these reasons, that they knew that else many men would not submit to the spiritual laws, and hence they established civil penalties, when men would not submit to the spiritual law by correction of the bishops (*A.-S. Laws*, p. 163). So church sanctuary was ordained, and any one who violated Christianity or revered heathenism by word or work, let him pay penalties (2). If a man in orders steal or fight, &c., let him pay penalty; and, above all, make amends before God, as the canon teaches, or yield to prison. If a mass-priest misdirect the people about a festival or a fast, let him pay a penalty. If a priest refuse baptism to him who has need thereof, let him pay a penalty (3). If a man in orders foredo himself with capital crime, let him be seized and held to the bishop's doom (4). To this it may be added that, in the *Mirror of Justice*, it is stated that Alfred hanged a judge because he judged a clerk to death over whom he had no cognizance (c. v., s. 1). And if a man guilty of death desire confession, let it never be denied him (5). If any one withhold tithes, let him pay a penalty. If any one withhold Rome's fee (*i. e.*, Peter's pence), let him pay a penalty. So if any one does not discharge church scot, or deny divine dues (6). If any one engage in Sunday marketing, let him forfeit the chattel and pay a penalty. If a freeman work on a festival, let him forfeit his freedom or pay a penalty (7). If a freeman break a lawful fast, let him pay; if a theow (slave) do so, let him suffer in his hide (*i. e.*, be flogged). The laws of Athelstan begin by enforcing tithes (*A.-S. Laws*, v. i. 145). So the laws of Edmund, which were civil and ecclesiastical, and in the ecclesiastical laws enforced the canons as to celibacy and the payment of tithes, church scot, and "Rome fee" (p. 246), in the secular laws uphold the right of church sanctuary (249). So the ecclesiastical laws of Edgar enforce tithes, church scots, and the "hearth-penny" or St Peter's pence (p. 265), and also festivals and fasts (*Ibid.*). So the secular laws of Ethelred uphold the rights of the church. Let no man reduce a church to servitude, nor unlawfully make church-mongering, nor turn out a church minister, without the bishop's counsel (*A.-S. Laws*, p. 317). Let God's dues be paid—that is, plough alms and tithes, and "Rome fee," and church scot (308). Let Sunday festivals be rightly kept, and let marketings and folemoties be carefully abstained from (13). And let all St Mary's feast-tides be strictly honoured (14), and all other festivals and fasts (15). And the witan have chosen that St Edward's mass-day shall be celebrated all over England (16). And if any excommunicated man (unless a suppliant) dwell anywhere in the king's proximity before he has earnestly submitted to divine correction, let it be at the peril of himself and all his property (p. 313). The ecclesiastical laws of Canute ordained that if a priest was charged with a crime, he should clear himself in the "house," or with the "corsned" (*vide ante*, p. 36); and if a priest was found in false-witness or theft, &c., let him be cast out of the community of ecclesiastics, unless he made amends, as the bishop might direct (*A.-S. Laws*, v. i., p. 365). And tithes and church scot and "Rome fee" were to be paid (367). And Sundays were to be observed, and festivals, and fasts (376). And, by the secular law, if a servant of the altar be a homicide, or work iniquity, let him forfeit both degree and country, and go in exile, as the pope shall prescribe to him, and do penance (*Ibid.* 401). If a man in holy orders defile himself with crime worthy of death, let him be seized and held to the bishop's doom, according as the case may be (*Ibid.* 402). If any one with violence refuse divine dues, let him pay penalty (405). So also the laws of the Confessor contained similar provisions (443), of which the chief have been given.

under the name of Edward the Confessor, as they have been rejected for spurious,<sup>1</sup> upon the fullest consideration of antiquarians (*a*). They are in Latin, and bear evident internal marks of a later period. They are supposed to have been written, or collected, about the end of the reign of William Rufus ; and are to be found in the collections of Lambard and Wilkins.

(*a*) This is a mistake, unless all that the author meant was that this collection of laws was not actually made by or under the Confessor ; and that it by no means contained the whole of the laws in force in his time ; and, indeed, as he cites this collection himself, this is probably his real meaning, which is hardly expressed correctly by the word “spurious.” The collection, upon the face of it (as already has been seen), purports to have been made in the fourth year of the Conqueror (*vide ante*, p. 44), and would hardly be less authentic on that account. But there is no doubt that it was extremely imperfect, and indeed omitted the most important portions of the laws in existence under the Confessor, because those laws were for the most part *customary*, and *unwritten*, and there would be great difficulty in collecting and embodying unwritten customs. That this was the real reason of the imperfect character of this collection, has been already shewn, and will be seen from a subsequent collection of the laws of the Conqueror, in which he embodies many of the customary laws in force under the Confessor. “*Istæ sunt leges et consuetudines quas Willielmus rex, post adquisicionem Angliæ, omni populo Anglorum concessit tenendas ; æadem quas predecessor suus Edwardus, servavit.*” These laws were conceded in consequence of the clamour of the people for the customs of the Confessor, and in the meantime those customs had been better ascertained. Thus, therefore, it is rather in the laws of the Conqueror, than in this collection of the laws of the Confessor, that the most important portions of the law in force under the Confessor are to be found ; those portions having previously been *unwritten* (*vide ante*, p. 45). And this is only an illustration of an observation which has already been made more than once, that the most important portions of the law in existence under the Saxons were customary and unwritten, and embodied in usages and institutions, in existence at the time of the invasion, and undoubtedly of Roman origin. The Conqueror in his laws preserved all the customs and institutions previously existing (save so far as consistent with any of his own newly-enacted laws), and this was very much what the Saxons had done before.

<sup>1</sup> Spelman *voce* Ballivus.

## CHAPTER II.

### WILLIAM THE CONQUEROR TO HENRY II. (a)

*The Conquest—Saxon Laws confirmed—The Laws of William the Conqueror—Trial by Duel in Criminal Questions—Establishment of Tenures—Nature of Tenures—Different Kinds of Tenures—Villanage—Of Escuage—Consequences of Tenure—Of Primogeniture—Of Alienation—Of Judicature—The Curia Regis—Justices Itinerant—The Bench—The Chancery—Judicature of the Council—Of the Spiritual Court—Of the Civil and Canon Law—Doctrines of the Canon Law—Probate of Wills—Constitutions of Clarendon—Of Trial by Duel in Civil Questions—Of Trial by Jury—By the Assize—Of Deeds—A Feoffment—A Fine—Of Writs—Of Records.*

THE accession of William of Normandy to the English throne makes a memorable epoch in the history of our municipal law. Some Saxon customs may be traced by the observing antiquary, even in our present body of law; but in the establishment made in this country by the Normans, are to be seen, as in their infancy, the very form and features of the English law (b). It is to the

(a) The author heads this and the next two chapters alike—"William the Conqueror to John;" thus treating the whole period as one, and mixing up the events of it without distinguishing the important era in the history of our law which is marked by the reign of Henry II. The second of these two chapters, however, is entirely devoted to the law as it was in the reign of Henry II., and therefore it appeared better to so entitle the chapter of that reign, and to entitle the present, William I. to Henry II.

(b) This and what follows must be taken with great qualification, and is true only to a limited extent; for, as already has been shewn in the Introduction, it would be far more true to state, as Lord Hale does, that "in the establishment made in this country by Edward I. are to be seen, as at their infancy, the very form and features of English law." And this, indeed, at a future page the author himself will be found to indicate. The Conquest, by itself, effected far less direct alteration in our laws and institutions than the author appeared to suppose, and the change was infinitely more gradual and progressive than he here represents. The Normans brought the trial by battle and the feudal system; and this was all that was distinctive in *their* system. All the rest—all that has remained to us—was of Roman origin. Although it may have been developed in the Norman period, it was not characteristically Norman, and would have been, no doubt, in due time developed by any nation as it attained civilisation, and advanced in intelligence. The laws of the Conqueror and his successors preserved the laws and *customs* of the Saxons, save so far as inconsistent with any laws and institutions which he introduced. The principal change he introduced was a development of the feudal system, which was military in its character, and therefore did not interfere with civil institutions, and not necessarily with civil rights, except within the limits of its own operation. The customary rights of the agricultural tenants, who formed the main body of the people, were confirmed. There is a remarkable passage in Bracton which very well explains what occurred at the Conquest, and is the account given in the *Mirror*, which says, that at the Conquest many freeholders were forced to hold their lands in villenage; which implies that it was not a universal revolution:—"Fuerunt etiam in conquestu liberi homines qui liberè tenuerunt tenementa suaper libera servitia vel per liberas consuetudinas, et cum per potentiores ejecti essent, postmodum reversi receperunt eadam tenementa sua tenenda in villenagio, faciendo inde opera servilia: sed certa et no-

Conquest and to the consequences of that revolution that the juridical historian is to direct his particular attention. A new order of things then commenced. The nature of landed property was

minata: et nihilominus liberi quia licet faciat opera servilia cum non faciunt ea ratione personarum sed ratione tenementorum.”—(*Bracton*, lib. 1, c. 11, fol. 7). That is, they were not villeins, though they held their land in villeinage, subject to the invaders who had ejected them. It is manifest that this was not a universal, or legal, or political change, but the result of individual acts of spoliation, and probably only against the tenants of those who had forfeited their lands in war. And there is a remarkable passage in the *Mirror*, which affords an apt commentary upon the above, and a striking illustration of what occurred at the Norman, and probably at the Saxon conquest. It says that the first conquerors (and, as the work was originally written in the Saxon times, this no doubt included the Saxons, though, of course, it also applied to the Normans) “enfeoffed the earls, barons, knights, and villeins, some to hold by tenure for the defence of the realm, and some without obligation of service, and some to hold by villein customs, as to plough the lord’s lands, to reap, cut, and carry his corn or hay. And it is said villeins are tillers of land, and of villeins, there are tillages called villenages, and that villeins became freemen if their lords granted or gave to them any free estate of inheritance to descend to their heirs, or if the lord took homage from them.” So that the land might be made freehold without deed. And then it is said, “And although the people have no charters, deeds, or muniments of their lands, (i.e., they who so held), nevertheless, if they are put out of their possessions wrongfully, they might be restored to their estates as before, because they could shew that they knew the certainty of their services and works by the year, as those whose ancestors before them were astræis (i.e., serfs), for a long time.”—(*Ib.*) From which it plainly appears, that some villeins became, by custom, or implied grant, tenants in socage, or by certain plough-service, which was a freehold tenure, and so made them freemen; for it was a maxim in law that freeholders must be freemen; and, therefore, to have a freehold was to be free. This power of custom must have been of inconceivable value and importance to the great body of the people, who were thus becoming gradually emancipated, and raised from slavery to villenage or serfdom, from villenage or serfdom to freedom; and this may explain the attachment of the people to what they called the “customs of the Confessor,” i.e., the customs known and remembered as of his time, by the generation of men living at and after the time of the Conquest. And it is remarkable, that in the *Mirror*, immediately after the passage just quoted, follows this: “And thereupon (i.e. upon the customary enfranchisement of villeins by their lands becoming freehold) St Edward, in his time, caused inquiry to be made of all such who held and did to him such services as ploughing his land, besides their lawful customs,”—i.e. those who became emancipated through holding any of their land by certain socage or plough-service, which made it freehold, and so made them free, irrespective of other services. And it is added, “that many of them were wrongfully forced to do other services, to bring them into servitude again” (*Ib.*), which, no doubt, was after the Conquest, and caused that great cry among the people for the restoration of the customs of the Confessor—i.e., of the Confessor’s time. These customs and tenures were expressly confirmed by the Conqueror. No sudden or sweeping change in our institutions was effected, and all the municipal institutions, as well as the manorial, were maintained. So the tenure of land, except so far as regarded those who held under military tenure—that is, by knight-service, which applied only to the nobles and knights—the common freehold tenures, also the tenure in villenage, were left unaffected. The charter of the Conqueror, indeed, imposed an oath of allegiance upon all freemen; but allegiance implies protection, and the charter went on to guarantee their possessions; and though it also imposed, as a condition, readiness for military service for the defence of the realm, there is nothing to carry it further than that obligation, which already existed, and is indicated in the laws of Canute as to military reliefs (*vide ante*). The Conqueror expressly confirmed the customs of the country as to the rural tenantry, villeins, or freemen. No doubt, as Lord Hale says, the Conqueror, like all previous conquerors, took into his hands all the demesne lands of the crown (*Hist. Eng. Law*, p. 97), and no doubt, also, he seized the lands of all who had been in battle or rose in rebellion against him (*Ib.* 97), and in re-granting these lands, imposed military service as the condition of tenure. But that great authority cites Spelman, and an ancient record which he quotes, and maintains that all others were



entirely changed; the rules by which personal property was directed, were modified; a new system of judicature was erected; new modes of redress conceived; new forms of proceeding were devised;

allowed to retain their lands upon the ancient tenure (98); and he cites the great case of the recovery of a large number of manors, after the Conquest, according to the ancient laws and customs of England, the record of which is set out at length by Lord Coke in his Reports, and also by Spelman, in his *Life of Eadmerus* (*Hist. Com. Law*, 98.) Lord Hale shews that it was only partially the possession or the tenure of land was altered, and so as to the rule of descent; it was, he says, altered "little by little," an expression which accurately expresses the historic truth. Thus, then, the changes in the tenure of land were, in the words of Hale, introduced not at once, but by "little and little," and were not general, but, for a time, only partial and gradual. And this was the real character of all the changes introduced at the time of the Conquest, and so it has been on all similar occasions in our history; and therefore the statements which follow can only be taken as true, subject to this important qualification. The changes that were effected, indeed, were rather by judicial than legislative authority, and were mainly the result of alterations in the system of judicature. But the statement that a new system of judicature was created, for example, is not correct, and is calculated to mislead; for, as already pointed out in the Introduction, nothing is so remarkable in our legal history at this era as the absence of any apparent change in our legal system, and the skill with which it was modified without being changed: which will be seen in the history of this and the next reigns.

It is to be observed, with regard to the estates of the church, it is clear that their tenures were not altered; for Glanville, who was chief justiciary under Henry II., distinctly states in his celebrated *Treatise* that the baronies of the bishoprics "are held in frankalmogne" (lib. vii. c. 1). Littleton quite confirms this, and Lord Hale, as already has been seen, strongly contests the notion that there had been any general alteration in the tenure of the land of the kingdom at the Conquest. If, therefore, Blackstone stated "that the Conqueror thought fit to change the spiritual tenure of frankalmogne, under which the bishops had their lands during the Saxon government, into the feudal tenure by barony" (2 *Bl. Comm.* 156), all that is important is his distinct admission that the tenure was so *before* the Conquest; the testimony of Glanville, of Bracton, of Littleton, and of Hale is overwhelming to show that the tenure had not been legally changed. The changes produced in the laws after the Conquest being the result rather of judicial than legislative changes, it would have been better to have first given some account of those improvements in the judicature which led to these results. Instead of this, however, the author has given, without any authority, a theory of sudden change, including the sudden institution of a *curia regis*, to which he seems to ascribe great importance; whereas, the ordinary justice of the country, court and criminal, being local, and remaining so for a long time, it was in the local judicature the most important changes took place, and those very gradually and by degrees. Towards the end of the chapter the author gives some account of a change instituted in the proceedings of the county court, which led to a result not less important than the establishment of trial by jury in all cases; but he failed to notice the not less important fact that it was before the king's justiciary the court was held, and that *he* directed the jury to be sworn, and thus effected this important change. That was one instance of the important changes effected, not by legislation, but by judicial decision, and therefore gradually and by degrees. And in the order of time and events these changes in the judicature which produced these results, and then those changes which they produced, should have been recorded. Moreover, these changes for the most part did not take place in the reign of the Conqueror, nor of his successor; and though the beginnings of some of them took place in this reign, they were for the most part commenced in the reign of Henry I., and carried out in that of Henry II. Both of these reigns constitute eras or epochs in our legal history far more important than that of the Conqueror, whose conquest was rather a political than a legal event, and made no sudden or immediate general change in the laws or institutions of the country; and though the Conquest led to these changes, it was indirectly and almost accidentally, and chiefly by the gradual development of legal principles in judicial decisions. It was not, therefore, the *direct* effect of the Conquest so much as its indirect and accidental consequences which produced these changes, and thus it is they were so gradual and progressive. This would have been seen more clearly had the author separated the reigns of the Conqueror and his successor from those of Henry



the rank and condition of individuals became entirely new; the whole constitution was altered; and after fluctuating on a singular policy, pregnant with the most opposite consequences of freedom and slavery, by degrees settled into peace and orderly government. In short, a state of things then took place, from which, after innumerable alterations, arose the present frame of English jurisprudence.

It has long been a debated question, in what manner William was the *conqueror* of this island; nor has the discussion been confined to historians and antiquaries: the adherents of modern parties did, at one time, warmly interest themselves in the decision of a point, which they considered as involving consequences very material to the political opinions they avowed. The lovers of high monarchical authority thought they derived a very ancient and rightful title to all kinds of prerogative in the king, by maintaining that William made the people of this country submit, as a conquered nation, to his absolute will.

The Conquest.

The friends of liberty, admitting as it should seem, in some measure, the consequences of such a claim, contended as firmly that William never assumed such powers, and was in truth no conqueror. Attempts have been made to explain the term *conquest* in such a manner as to get rid of any unfavourable conclusions from the word. It is said to have been a conquest over Harold, and not over the kingdom; that conquest signifies *acquest*, or new acquired feudal rights;<sup>1</sup> with other explications of the like design and import; so important a matter was it esteemed to ascertain the true nature of this event in our history; as if the tyranny of a prince who lived seven hundred years ago, could be a precedent for the oppressions of his successors; or any length of time could establish a prescription against the inalienable rights of mankind. The pre-

I. and Henry II. The course of progression would then have been displayed, which it is the great object of legal history to exhibit. Instead, however, of that course, he has treated those three important reigns all together, and has thus produced great confusion, lost the chronological order of events, and missed the progression they illustrate. For example, he does not deal distinctly and separately with the reign of Henry I., and that elaborate body of laws of his reign, of which we have a most valuable collection, which is noticed and cited by Lord Hale, and is once or twice cited by our author, but of which he offers no account. Yet it is most important, as the middle stage between the state of our laws and institutions at the time of the Conquest and for some time after it, and that period of development which they had reached in the reign of Henry II., under the auspices of Glanville.

It is not easy to supply in notes deficiencies so extensive, still less easy is it to supply the lack of proper order and arrangement. All that can be done is to introduce, wherever an occasion occurs, any omitted matter which tends to supply these deficiencies, and fill up the gaps and missing steps in the course of the legal history. In order, also, to draw some distinction between the reigns, and especially to mark the important era of the reign of Henry II., the titles of this and the two following chapters have been altered. The author had entitled them all "William the Conqueror to John;" but as the most important portions of the first relate to the reign of Henry II., and the other two entirely so, it has been thought better to entitle the first "William I. to Henry II.," and the other two, "Henry II." and "Henry II. to John."

<sup>1</sup> In the law of Scotland, at this day, *feuda nova*, or, as we call it, lands taken by purchase, are termed *feus of CONQUEST*.—*Ersk. Prin.* b. 3, tit. 8, s. 6.

sent prevailing notions of free government are founded on better grounds than the examples of former ages, when our constitution was agitated by many irregular and violent movements: they are founded on a rational consideration of the ends of all government, the good of the whole community. To leave such useless disquisitions, let it suffice to relate the fact: that William put off the character of an invader as soon as he conveniently could; and took all measures to quiet the kingdom in the enjoyment of its own laws, and a due administration of justice.

We are told, that in the fourth year of his reign, at Berkhamstead, in the presence of Lanfranc, archbishop of Canterbury, he solemnly swore that he would observe the good Saxon laws confirmed. and approved ancient laws of the kingdom, particularly those of Edward the Confessor; and he ordered that twelve Saxons in each county should make inquiry, and certify what those laws were (*a*).

When the result of this inquiry was laid before William, and he had set himself to consider the different laws of the kingdom more particularly; he shewed a disposition to give a preference to the Danish, as more conformable with those of Normandy; being sprung from the same root, and better suited to the genius of his own subjects. This alarmed the English, who wished to have no more of that law imposed, than what had been incorporated into their customs by Edward the Confessor. They beseeched him not to recede from his solemn engagement; and conjured him by the soul of Edward, who had bequeathed him his present sovereignty, to confirm the English in possession of their laws, as they stood at the death of the Confessor. To this William at length consented, and, in a general council,<sup>1</sup> solemnly ordained (*b*), that the laws of

(*a*) What took place is thus described in the preamble to the collection of laws which was the result of the enquiry, "Post quartum annum adquisicionis regis Willelmi istius terræ, consilio baronum suorum fecit summonire peruniversos patriæ comitatus, Anglos nobiles sapientes et in lege sua eruditos, ut eorum consuetudines ab ipso audiret. Electis igitur de singulis totius patriæ comitatibus. xii jurejurando, imprimis sanxerunt ut quoad possent, recto tramite incidentes legum suarum ac consuetudinum sancita edicerent, nil pretermittentes, nil addentes, nil prevaricando mutantes." It is impossible to imagine anything more authentic, and yet the author elsewhere terms the collection "spurious," by which, however, probably he meant no more than that the laws were not enacted in this form under the Confessor, which, no doubt, is the case, for they purport, on the face of them, to be a collection of *laws and customs*; still, there is a suspicious omission of matters important to the people. The first ten articles relate to the rights of the church, and the chief of these have already been noticed. The franchises of the nobility are mentioned, and the courts of the county and hundred. This is all that need be mentioned. The laws of the Conqueror himself were far more important.

(*b*) These really did contain important guarantees. It has been seen that there was no alteration as to the tenure of land, save so far as military tenure was already obligatory, or might be made so by actual grant of land on such tenure, or so far as all tenures were conditional upon allegiance and the defence of the realm. Then the laws of the Conqueror commenced thus, "Istæ sunt leges et consuetudines quas Willielmus rex, post adquisicionem Angliæ omni populo Anglorum concessit tenendas, eidem quas predecessor suus servavit." And among them was expressly mentioned the customary rights of the agricultural tenantry holding tenure or villenage, who formed the great body of the people, "Coloni et terrarum exercitores *non vexentur*

<sup>1</sup> Leg. Conq. 63.

Edward, with such alterations and additions as he himself had made to them, should in all things be observed.

In this manner was the system of Saxon jurisprudence confirmed as the law of the country; and from thenceforth it continued the basis of the common law, upon which every subsequent alteration was to operate.

Though these alterations soon grew very considerable, yet the direct and open change by positive laws was not great. The laws of William are in *pari materiâ* with those that remain of the Saxon kings, except such as introduced the feudal constitution, and the trial by duel. But a revolution was effected through other means, and that by slow and imperceptible degrees. The Normans brought over with them a disposition to favour the institutions to which they had been used in their own country; and the comparative state of the two people enabled them to succeed in the attempt. Having, from their continental situation, had greater opportunities of improving their polity and manners, they had very far surpassed the Saxons in knowledge and refinement. This was discoverable in their laws, which were conceived and explained with some degree of artificial reasoning. Though this jurisprudence was simple compared with what it grew to in after times, it was conceived on principles susceptible of the inferences and consequences afterwards really deduced from it.

The doctrine of tenures being once established by an express law, all the foreign learning concerning them of course followed (*a*). The other parts also of the Norman jurisprudence, their rules of

*ultra debitum et statutum, nec licet dominis remove colonos a terris, dummodo debita servicia persolvent*" (*A.-S. Laws*, 481, c. 1; *Laws of W. Cong.* c. 29.) So the burdens imposed by way of relief were defined, not only as to the knights, and barons, and landholders, but as to the villeins, or leaseholders. "Relevium villani melius averium," "qui terram ad censum annum tenet sit ejus relevium quantum unius anni census" (*Ib.* 477). The jurisdiction of the county and hundred courts was upheld, "Nemo querelam ad regem deferat, nisi ei jus defecerit in hundredo vel in comitatu" (*Ib.* 485). Oppressive distresses to enforce legal claims were repressed, "Nullus namium capiat nisi recto in hundredo vel comitatu tertii postulaverit" (c. 44.) The rights of relations to the effects of an intestate was admitted, "Si quis pater familias casu aliquo sine testamento obierit pueri inter se hæreditatem paternam æqualiter dividant" (c. 34.) Criminal procedure, according to the Saxon law, was simplified and improved: if a freeman was accused of theft, he might, if a good character, purge himself by his own oath; otherwise, by that of twelve compurgators: and capital punishment was confined to the graver cases.

(*a*) It is presumed the author means military tenures, *sed vide ante*. This and the other modes of tenure existed in this country before the Conquest, as will have been seen from the Saxon laws. The whole of these passages are illustrations of the substitution of theories in place of historical verities. The theory of the author was, that the English law was moulded on the Norman; and he deduced his theory from what seemed to him, no doubt, a strong probability. But there are those formidable *facts* and dates—(1) that the British had in the ninth century a system of law and legal procedure as elaborate and complete as that of this country a century after the Conquest; (2) that the Normans had no collection of laws until after ours was thus elaborated; (3) that the *Grand Coutumier* of Normandy is subsequent in date to the great treatise of Glanville, and is plainly founded thereon. And Hale, therefore, was of opinion that the Norman law was rather borrowed from ours than ours from the Norman. And that *both* were founded on the Roman appears equally clear.

property and methods of proceeding, soon began to prevail: they were referred to and debated upon as the native custom of this realm, or very fit to be ingrafted into it; and, being once introduced and discussed in the king's courts, which were framed upon the Norman plan, and presided over by Norman lawyers, they gradually became a part of the common law of England.

The revolution effected by these means was very important indeed. Besides tenures, with all their incidents and properties, the *aula*, or *curia regis* was established (*a*), as was the law of estates, the use of sealed charters, the trial by jury of twelve men, and the separate jurisdiction of the ecclesiastical judge. These were almost instant consequences of the Conquest. The other branches of the Norman law soon followed upon the like tacit admission, that they constituted a part of the common law of the realm.

We shall now consider those laws which were made by William the Conqueror, and have constantly gone under his name (*b*). The regulations made by these laws seem, most of them, very little worthy of curiosity, as differ-

The laws of  
William the  
Conqueror.

(*a*) It will be observed that the author cites no authority for these statements, and they are far too extreme. There is no evidence that a "*curia regis*" was established in this reign, and certainly not all at once; though there is an allusion in William's laws to the *Justitiarius Regis* (*A.-S. Laws*, c. i. 46), which cannot mean the sheriff, who is called *Justicia Regis* in the *Laws of the Confessor* (p. 415), because it is supposed in the laws of the Conqueror that the sheriff is convicted before the justiciary of some misconduct. But that evidently implies an extraordinary jurisdiction, and, as already mentioned, the Conqueror's laws had already enacted *quod nemo querelam ad regem deferat nisi ei jus defecerit in hundredo vel comitatu*, (c. 43,) so that it is clear there was no *curia regis* with ordinary or primary jurisdiction, and that quite agrees with what the *Mirror* says, speaking of the era of the Conquest—that remedial writs directed the *sheriffs* to decide cases. "It was ordained that every plaintiff have a remedial writ to the sheriff,—*questus est nobis quod, &c., et ideo tibi (vices nostras in hac parte committentes) præcipimus quod causam illam audias et legitime fine decidas*" (c. ii. 3.) No other remedial writ is mentioned, and no *curia regis*, except the exchequer, which is described as constituted for matters of revenue, and rather as an office than a court, to "affect" or assess amercements. The amercements, indeed, are alluded to as imposed in the king's court, but even in the laws of Henry I. the county court is called the *curia regis* (c. 7), and no other *curia regis* is alluded to; so that not only is there no evidence of the establishment of a *curia regis* at this time, but there is evidence that there was no such court. As to trial by jury also, it was, as will be seen, of very slow growth into a real trial by jurors on evidence, and for ages the jury were only witnesses. As to estates, they have already been alluded to; as to deeds, they were known long before the Conquest.

(*b*) The laws of the Conqueror are (as the author states further on), divided into separate portions, the first consisting of fifty chapters or sections, professedly (and to a great extent really) based upon the customs and laws of the Confessor, and have already been noticed; and the author, it will be observed, of these most important portions has taken no notice. The next portion consists of laws which he himself, apparently at a later period, enacted, and which contain more political constitutions, of a more severe character, and more of the nature of the laws of Canute. These, it is to be observed, are numbered on with the others in the versions of the laws which the author cites, so that sec. 1 of the second series is cited by him as 51, and so on; whereas in the last edition of the Anglo-Saxon laws they are separated in their numeration. In these, however, there is the important clause, that the laws of Edward, i.e., of Edward's time, should be observed, except so far as altered by any of the new laws. "*Hoc quoque præcipimus ut omnes habeant et teneant leges Edwardi regis in omnibus rebus adauctis hiis quas constituimus ad utilitatem Anglorum*" (c. 13).

ing in nothing from the subject of many Saxon constitutions. They make some alterations in the value of *weregilds* and penalties. They sometimes merely enforce or re-enact what was before the law of the realm, taking notice of the differences observed by the three great governing polities, the West-Saxon, Danish, and Mercian. The parts of these laws which are most material are the following.

The *relief*, or consideration to be paid to the superior upon succeeding to the inheritance, was settled in the case of an earl, baron, and vavasor,—the first at eight horses, the second at four, and the last at one; these were to be caparisoned with coats of mail, helmets, shields, and other warlike accoutrements.<sup>1</sup> The relief of those who held by a certain rent was to be one year's rent,<sup>2</sup> and that of a slave, or, as he was now called, a *villain*, was to be his best beast.<sup>3</sup> It was directed, that if a man died intestate, his children should divide the inheritance equally.<sup>4</sup> It was strictly enjoined that no one omit paying the due services to his lord, on pretence of any former indulgence.<sup>5</sup> A regulation was

The political constitutions the author notices farther on, and commences with those which are of a more municipal character. But in these he omits to notice the most important—as the important laws relating to the “coloni,” or villani, the tenants of manors, which have already been noticed, and to which it is here important to add an important law as to the servi, contained in the later series. “Si servi permanserint sine calumpnia per annum et diem in civitatibus nostris vel in burgis vel muro vallatis, vel in castris nostris, a die illa liberi efficiantur: et liberi a iugo servitutis sine sunt in perpetuum” (c. 16), upon which this important point is to be noted: that the “servi” are here distinguished from the villeins mentioned in the former series; these villeins being tenants in villenage; the servi, if not slaves, at all events are villeins in the sense of a personal, through predial servitude. It is very important to observe this distinction, which the author altogether loses sight of, confounding villeins with tenants in villenage, or even slaves with villeins. This law of the Conqueror may be best illustrated by some passages in the *Mirror*, as to the villeins and their emancipation. It is particularly pointed out that all villeins are not slaves, but that they are regardant or attached to the possessions of their lords; that they are tillers of land, dwellings in upland (i.e., country) villages, for of vil, it is said, cometh villeins, as of burghs, burgess, and of city, citizen; and of villeins there are tillages, called villenages. Thus it is said that villeins become free in various ways, and, among others, by the lords allowing them to remain for a whole year within a city or upon the king's “demesnes,” i.e., in a borough, for a borough was a town built upon part of the demesnes of the king, and owing him real service; whence came tenancy in burgage, which thus can be traced back to the Conquest. In the present law, boroughs, which are Saxon, are distinguished from cities, which are Roman, there being, it is noticed, none of our cities not of Roman origin. Another thing to be noted upon the law is, that as the Saxons found the municipal system here established, and merely adopted it, so of the Conqueror, who found the Roman cities, and the Saxon boroughs, and encouraged them. Another law upheld and enforced the frankpledge system, which was the laws of the boroughs, the Saxon “borh,” or pledge, being in part the origin of the borough, and the same term. The Conqueror was careful of the police of the realm, and there was a law enforcing upon all the municipal or civil authorities the duty of maintaining it. “Statuimus etiam, et firmiter præcipimus, ut omnes civitates, et burgi, et castella et hundreda totius regni nostri singulis noctibus vigilentur et custodiantur pro maleficis et inimicis; prout vice comites et aldermanni et prepositi, et ceteri ballivi et ministri nostri melius per commune consilium ut utilitatem regni providebunt,” (c. 6). And one weight and measure were established throughout the realm.

<sup>1</sup> 229 Conq. 22, 23, 24.

<sup>2</sup> 40.

<sup>3</sup> 29.

<sup>4</sup> 38.

<sup>5</sup> 34.

made respecting *namium*, or, as it has since been called, a *distress*, a kind of remedy which, according to some, was introduced by the Normans, and according to others was before in use here. It was directed,<sup>1</sup> that a *namium* should not be taken till right had been demanded three times in the county or hundred court; and if the party did not appear on the fourth day appointed, that the complainant should have leave of court to take a *namium* or distress sufficient to make him full amends. Thus this summary remedy was considered only in the light of a compulsory process, and was therefore called *districtio* (and thence in after-times *distress*), from *distringere*, which, in the barbarous latinity of those days, signified *to compel*. The remarkable law made by Canute in protection of his Danes was adopted by William, in favour of his own subjects. He ordained<sup>2</sup> that where a Frenchman<sup>3</sup> was killed, and the people of the hundred had not apprehended the slayer and brought him to justice within eight days, they should pay forty-seven marks, which fine was called *murdrum*. By virtue of this, presentments of *Englshery* were made; and all the former law upon the subject was continued, with the single difference of putting *Frenchman* in the place of *Dane*. William forbade all punishments by hanging, or any other kind of death;<sup>4</sup> and substituted in the place of it several kinds of mutilation; as the putting out of eyes, cutting off the hands or feet, and castration. This alteration was made, says the law, that the trunk may remain a living mark of the offender's wickedness and treachery.

There are some laws of William which establish the trial by *duel*, and sketch out certain rules for the application of it.<sup>5</sup> By one law, the same liberty is given to an Englishman, which every Frenchman had in his own country, to accuse or appeal a Frenchman, by duel, of theft, homicide, or any other crime, which before that time used to be tried either by the ordeal or duel. If an Englishman declined the duel, then the Frenchman was at liberty to purge himself by the oaths of witnesses, according to the law of Normandy. On the other hand, if a Frenchman<sup>6</sup> appealed an Englishman by duel, the Englishman was to be allowed his election, either to defend himself by duel or by ordeal, or even by witnesses; and if either of them were infirm, and could not or would not maintain the combat himself, he might appoint a champion. If a Frenchman<sup>7</sup> was vanquished, he was to pay to the king sixty shillings. In case of outlawry,<sup>8</sup> the king ordained, that an Englishman should purge himself by *ordeal*; but that a Frenchman appealed by an Englishman in such a case, should make out his innocence by a duel. However, if the Englishman should *be afraid*,<sup>9</sup> says the law, to stand the trial by duel, the Frenchman shall purge himself *pleno juramento*, that is, by oaths of compurgators.

<sup>1</sup> 229 Conq. 42.<sup>2</sup> 26.<sup>3</sup> Francigena.<sup>4</sup> 229 Conq. 67.<sup>5</sup> 68.<sup>6</sup> 69.<sup>7</sup> 70. In these and the other passages the word is *Francigena*.<sup>8</sup> *De omnibus rebus utlagarice*, 71.<sup>9</sup> *Non audeat*.

Thus was the trial by duel formally established in criminal inquiries; but with such qualifications annexed, as shew a regard to the prejudices which both people had in favour of their own customs. The trial by duel in civil causes (a) does not appear to have been introduced by any particular law; but when this opening was made, it soon began generally to prevail; and indeed, after such a precedent, it had more colour of legal authority than the numerous other innovations derived from that nation.

It was declared by a law of William<sup>1</sup> (b), that all free men <sup>Establishment</sup> should enjoy their lands and possessions free from <sup>of tenures.</sup> *unjust exactions and talliages*; so that nothing be taken from them but what was due by reason of services, to which

(a) There is one of the laws of William which has escaped the observation of the author, and apparently had reference to trial by jury—jurors in those days being, it will be borne in mind, witnesses. This law is in accordance with a series of similar Saxon laws, the origin of which evidently was to provide for trial by jurors, by providing witnesses of transactions who might afterwards be jurors. Hence the present law—"ne venditio et eruptio fiat, nisi coram testibus, et in civitatibus. Interdicimus ut nulla viva pecunia vendatur aut ematur, nisi inter civitates, et hoc ante tres fideles testes," (c. 10). This law probably had a twofold bearing, in favour of cities and of trade, and also in favour of the administration of justice, by providing pre-appointed witnesses who might be jurors. It is to be borne in mind that ordeal or battle were only resorted to from *default* of witnesses who might be jurors. If there were no witnesses, there could be no trial by jury; and hence the recourse to other modes of trial, from an apparent necessity. From the *Mirror* it plainly appears that this was so, and that the duel, like the ordeal, was considered a mode of *trial*, and only resorted to in default of a better, and that the duel was considered less absurd than the ordeal, the parties being each *sworn* to the truth of their respective cases, and then attesting the truth of their oath by their persons; wherefore this mode of trial was called "*juramentum duelli*." "There are, it is said, many manner of proofs, by record, by battle, by witnesses" (i.e., jurors). "And the usage of battle is allowable by the law, so that the proof in felony and other cases is often by battle, according to the diversities of the case. For in *felony* none can contest for another; but in *actions* it is lawful for the plaintiff to make their battles by their bodies or by *lawful witnesses*, because in real actions none can be witness for himself; and no man is bound to discover his real right," (the parties in the duel being, as already stated, *sworn* to the truth of what they contended for). Combats, it is added, may be in other cases than felonies, "for if a man hath done any falsity to one, for which he is appealed, and denies it, it is lawful for *one* to *prove the action either by jury*, or by any body, or by the *body of a witness*." "And so it is in cases where you deny your gift, bailment, pledge, or deed, and in cases where the battle could not be joined, *nor was there any witness*, the people in personal actions *used* to help themselves by a miracle of God, (the ordeal); and if the defendant could not give battle, and if the plaintiff had no witnesses to prove his action (so that there could not be a trial by jury, the jurors being witnesses), then the defendant might clear his credit by the miracle, or leave the proof to the plaintiff, for Christianity suffered not that they be by such wicked arts cleared, if one may otherwise avoid it." And then it is stated that whoever waged the battle was *sworn* to the truth of that for which he contended, so that he was a juror. Thus, therefore, the ordeal was regarded as a mode of trial by jurors.

(b) This is only one of several political constitutions, and it is important that they should be considered all together. They are the first in the second series of the Conqueror's laws, and amply exhibit his most matured policy. At the outset, in the first article, he propounds the wise scheme of a just and impartial rule over all classes and races of his subjects, with the view of blending them in one kingdom, on the basis of their common faith, "*Statuimus imprimis super omnia unum Deum per totum regnum nostrum venerari, unam fidem semper inviolatam custodiri, pacem et secretatem et concordiam judicium, et justiciam, inter Anglos et Norman-*



they were bound. What those services were, we are now going to consider.

The most remarkable of William's laws are cap. 52 and 58. The tenor of the 52d is this: *Statuimus ut omnes liberi homines fœdere et sacramento affirmant, quòd intra et extra universum regnum Angliæ (quod olim vocabatur regnum Britannicæ) Wilhelmò suo domino fideles esse velint; terras et honores illius fidelitate ubique servare cum eo, et contra inimicos, et alienigenas defendere.* The interpretation put upon this law is, that all owners of land are thereby required to engage and swear, that they become vassals or tenants, and as such will be faithful to William, as lord, in respect of the *dominium* (upon the feudal notion) residing in a feudal lord<sup>1</sup>; that they would swear, everywhere faithfully to maintain and defend their lord's territories and title as well as his person; and give him all possible assistance against his enemies, whether foreign or domestic.<sup>2</sup> These engagements and obligations being the fundamental principles of the feudal state, it was said that when such were required from every free-man to the king, that polity was in effect established.

As the enacting language of this law is in the first person plural, *statuimus*, and the king is spoken of in the third person, some writers think it must be considered as an act of the legislature. A regulation that was at once to overturn the whole law of the kingdom with regard to land, could not well be hazarded on any other authority; and indeed chap. 58 of these laws, which

nos, Francos, et Britones, &c.; et inter omnes nobis, subjectos per universam monarchiam regni Britannicæ, firmiter et inviolabiliter observari." Then comes article 52, extracted by the author. Next is an article placing all the subjects of the realm under the king's protection, "ut omnes homines sint sub protectione et in pace nostra per universum regnum." Allegiance and protection being correlative, they are thus closely connected in the laws. Then comes the clause of immunity: "Ut omnes liberi homines totius monarchiæ regni nostri habeant et teneant terras suas et possessiones suas bene et in pace, libere ab omni exactione injusta, et ab omni tallagio, ita quod nihil ab eis exigatur vel capiatur, nisi, servicium suum liberum, quod de jure nobis facere debent, et facere tenentur, et prout statutum est eis, et illis a nobis datum et concessum, jure hæreditario in perpetuum." Then comes c. 58, which the author extracts in the text, and then another, which he omits, and which is important for its construction, "Ut omnes liberi homines sint fratres conjurati ad monarchiam nostram et ad regnum nostrum pro viribus suis et facultatibus, contra inimicos pro posse suo defendendum, et viriliter servandum; et pacem, et dignitatem coronæ nostræ integram observandum; et ad iudicium rectum, et justiciam constanter omnibus modis pro posse suo sine dolo et sine dilatione faciendam." The scope of the whole seems to be simply allegiance and protection, and the defence of the realm, by means of knight-service, for the defence of the kingdom; and possibly also, at the desire of many of the owners, it changed their former tenure into knight-service; which introduction of new tenures, however, was not done without the consent of the council of the realm, as appears by the provisions already quoted, whereby it appears; says Hale, that there were two kinds of military provisions—one that was set upon all freeholds by common consent of freeholders, and was called assize of arms, and the other was by tenure, upon the infuedation of the tenant, and was sometimes called knight-service. And hence it came to pass that these estates descended to the eldest son (*Hist. C. L.* 222). And by "little and little," says Hale, "this rule of descent was introduced into the other lands of the kingdom" (*Ibid.*)

<sup>1</sup> Wright Ten. 68.

<sup>2</sup> *Ibid.* 68.



dilates more largely upon the subject of this, refers to it as ordained *per commune concilium*.

The terms of this law are very general; and probably it was purposely so conceived, in order to conceal the consequences that were intended to be founded thereon. The people of the country received with content a law which they looked upon in no other light than as compelling them to swear allegiance to William. The nation in general, by complying with it, probably meant no more than the terms apparently imported, namely, that they obliged themselves to submit, and be faithful to William, as their lord, or king, to maintain his title and defend his territory.<sup>1</sup> But the persons who penned that law, and William who promoted it, had deeper views, which were a little more explained in his 58th law. This constitution runs in these words: *Statuimus etiam, et firmiter præcipimus, ut omnes comites et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti habeant et teneant se semper bene in armis et in equis, ut decet, et oportet; et quòd sint semper prompti, et bene parati ad servitium suum integrum nobis explendum, et peragendum, cum semper opus fuerit, secundum quod nobis DE FEODIS debent et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti, et illis dedimus et concessimus in fiedo, jure hæreditario (a).*

By this law the nature of the service to be performed is expressly mentioned, namely, knight-service on horseback; and the

(a) Lord Hale, commenting upon this, observes that it related to the assize of arms, and to services reserved upon grants made out of the crown lands, who held on knight-service: and he adds that these laws were not imposed *ad libitum regis*, but were such as were settled by the common consent of the realm (*Ibid.* 107). So Hale observes elsewhere that the laws of the Conqueror confirmed the Saxon rule of descent, "Si quis intestatus obierit liberi ejus hæreditatem æqualiter dividunt," and goes on to point out that this led to some evils, "as it weakened the strength of the kingdom, for, by frequent parcelling and subdividing of inheritances, they became so divided that there were few persons of able estates left to undergo public charges. And, therefore, William having got into his hands the demesnes of the crown, and also many and great possessions of those that opposed him, disposed of their lands, or great part of them, to those that adhered to him, and reserved certain honorary tenures." That is to say, as far as he could, he established tenure by military service. Lord Hale's view of the meaning of the constitution, it has already been shown, is correct—viz., that it applied only to the assize of arms, or those who held of the king, either part of his demesnes, or forfeited land granted by him on military tenure. And this view is upheld by a reference to a passage in the *Leges Henrici Primi*; which, though the author refers once or twice to the laws, he had not observed—had he read them, he would not have failed to notice it. The passage here referred to is in c. 2, entitled "De confirmatione legum Edwardi Regis:" "Militibus, qui per loricas terras suas deserviunt (or defendunt) terras dominicarum carucarum suarum quietas ab omnibus gildis et ab omni operæ proprio, dono meo concedo, sicut tam magno gravamine allevati sunt, ita equis et arma se bene istruant, ut apti et parati sunt ad servitium meum et ad defensionem regni mei," which implies merely that they should be ready for military service when required for the defence of the realm, but was equally obligatory before the Conquest, as appears from the obligation to render military "relief" on the death of a noble or knight (*vide Leges Can.*, 32). It is evident that this passage quite confirms Lord Hale's view.

<sup>1</sup> Wright Ten. 79.

term of each feudal grant was declared to be *jure hæreditario* (a). This latter circumstance must have had a very considerable effect in quieting the minds of men respecting the nature of this new establishment. The Saxon feuds, being perhaps beneficiary, and only for life, were at once converted into inheritances; and the Normans obtained a more permanent interest in their new property, than probably they had before enjoyed in their ancient feuds.

From these two statutes were deduced the consequences of tenure: from these a new system of law sprung up (b), by which the landed property of the kingdom was entirely governed till the middle of the last century, and is, in some degree, influenced even at this day. The Norman lawyers, who were versed in this kind of learning, exercised their talents in explaining its doctrines, its rules, and its maxims; and at length established, upon artificial reasoning, most of the refinements of feudal jurisprudence.

By the operation of these two statutes, the Saxon distinction between bocland and folcland, charter-land and allodial (c), with

(a) The author failed to observe that, from the nature of feuds or fiefs, they necessarily implied a *donation* of land; in that, it is manifest that Hale was right in his view that any alteration in tenure could only have applied either to the demesne lands of the crown, or to forfeited lands re-granted by the crown. As Guizot points out, when the feuds were created the lands were given, and the Conqueror could only give lands which were his to give, and Hale conclusively shows that there was nothing like a general confiscation. The definition of "feudal" and allodial is very simple, as Guizot gives it. It is fe-od land, or property held as fee or reward; and all-od land, or land held unconditionally and absolutely in full property. Guizot also points out that the word *beneficium*, which preceded fe-od or fief, and meant the same thing, likewise on the face of it imported an estate or land received from a superior, and on the tenure of some service. He refutes the idea held by Montesquieu, Robertson, and apparently by Reeve, that benefices were revocable or temporary, and shows that they were hereditary; although some may have been temporary, or for life, as well as hereditary. And he accounts for the gifts ("reliefs") rendered on the death of the holder, by the desire to secure a confirmation and protection of the inheritance from the superior. For some centuries before the era of the Conquest, he thinks freehold or allodial property was becoming beneficiary, and estates became changed into fiefs or feuds, mainly from a sense of weakness and desire for protection, which was gained by becoming a member of the great feudal hierarchy or organisation under which the obligations of lord and vassal were correlative; and the lord was bound to protect his vassal, as the vassal was bound to protect his lord (*Lect. sur la Civ. en France*, lect. i.). This explains the spread of the feudal system, which, however, existed in its essence and substance before the Conquest, since "reliefs" and military reliefs were rendered, and were defined by the laws of Canute.

(b) This is an error, for, as already shown, the system existed in substance before the Conquest, and, as Guizot shows, had been growing for ages. The prevailing error of the author is to lose sight of the *progressive* growth and development of institutions.

(c) It has already been shown that our author confused these distinctions. There was nothing in the above "statutes," or in any change effected at the Conquest, to alter them. Bocland meant land held by deed, which might or might not be hereditary, or allodial; for allodial land, *i. e.*, common freehold land, might of course be conveyed by deed, and it was indeed that kind of land which was chiefly so conveyed. Feudal land was not so conveyed or transferred, and, on the other hand, folcland, or land held by custom, *might* be hereditary (as is the case with "customary freeholds" at this day), though usually and originally not so. There was nothing in the feudal system to abolish or alter these qualities of land. Feudal was indeed opposed to allodial, although, as already shown, allodial land could be converted into feudal; and so of lands already in the hand of the crown. The notion

the *trinoda necessitas*, and other incidents, was totally abolished; and all the *liberi homines* of the kingdom, on a sudden, became possessed of their land under a tenure which bound them, in a feudal light, mediately or immediately to the king. Thus, if *A.* had received his land of the king (*a*), and *B.* had received his of *A.*, *B.* now held his land of *A.* on the same terms, and under the same obligations, that *A.* held his of the king (*b*); each considering himself under the reciprocal obligation of lord and tenant. In this manner it became a maxim of our law, that all land was held mediately or immediately of the king, in whom resided the *dominium directum*; while the subject enjoyed only the *dominium utile*, or the present cultivation and fruits of it (*c*).

This position led to consequences of the greatest importance. Military service being required by an express statute (*d*), the other effects of tenure were deductions from the nature of that establishment. As all the king's tenants were supposed to have received their lands by the gift of the king, it seemed not unreasonable that, upon the death of an ancestor, the heir should purchase a continuance of the king's favour, by paying a sum of money, called a *relief*, for entering into the estate (*e*). As he would be bound to the same service to which

that the Saxon distinction between bocland and folcland was abolished, is an entire error. In the laws of Henry I., which, at all events, are an extemporaneous exposition of what was understood to be the law at that time, bocland is mentioned more than once; and there is a remarkable passage in the *Mirror*, already quoted, in which folcland is distinctly described: "And although it be that the people have no charter deeds nor muniments of their lands, nevertheless, if they were ejected, or put out of possession wrongfully by bringing an assize (the remedy for a *freehold*), they might be restored to their estates as before, because they could shew the certainty of their services; and therefore it is said that St Edward caused an inquiry to be made of such as so held by custom." The *origin* of this kind of tenure is also explained in a previous passage, in which it is said that only if a lord granted or *gave* to a villein an estate of inheritance, or even took his homage for it, then he would have such an estate, and be free; yet he would have no deed to show, and the condition of his estate would only be known by common custom. This was the origin of all the *common* freehold estates of the kingdom as distinguished from those which were originally of military tenure. To suppose it therefore abolished at the Conquest was an egregious error.

(*a*) But then, in order to *grant* it, the king must *have* it, and he could only have it either because originally belonging to the crown, or because forfeited to the crown by rebellion, treason, or some other cause of escheat. The notion of any statute having altogether altered the tenure of all the lands in the kingdom had been refuted by *Ilale*, and is entirely visionary.

(*b*) This, it is conceived, is an entire error; that is, it would not necessarily be so. A person holding by knight-service could grant out land to knights on like tenure, and they to ordinary freeholders on what was called socage tenure, *i. e.*, a *certain* rent, either in corn or kind. The baron would be bound to the king to furnish so many knights, and the knights to the barons to render their military service, but the socage tenants would be bound to their lords to render their own proper services.

(*c*) This is hardly accurate, and seems to confound *usufructus* with *proprietas*. *Dominium directum* meant rather political rule; *dominium utile* meant absolute property, for personal benefit.

(*d*) *Sed quære, vide supra.*

(*e*) But the author had failed to observe, that as to reliefs, they were required to be rendered before the Conquest, on the death of any noble or knight, and were military in their nature, consisting of arms, and horses, and trappings. (This appears

his ancestor was liable, and which was the only return that could be made in consideration of his enjoying the property, it seemed reasonable that the king should judge, whether he was capable, by his years, of performing the services: if not, that *he*, as lord, should have the *custody of the land* during the infancy; by the produce of which he might provide himself with a sufficient substitute, and in the meantime have the care or *wardship* of the infant's person, in order to educate him in a manner becoming the character he was to support as his tenant. If the ward was a female, it seemed equally material to the lord, that she should connect herself in marriage with a proper person; so that the disposal of her in *marriage* was also thought naturally to belong to the lord.

The obligation between lord and tenant so united their interests, that the tenant was likewise bound to afford *aid* to his lord, by payment of money on certain emergent calls respecting himself or his family; namely, *when he married his daughter, when he made his son a knight, or when he was taken a prisoner.*

Besides these incidents, it was held that land should *escheat*, or fall back into the hands of the lord, for want of heirs of the tenant, or for the commission of certain crimes; and, in cases of treason, that it should come into the hands of the king by *forfeiture*.

from the Laws of Canute, c. 71.) This implied an obligation to be ready to render military service when required for the defence of the realm, and this was all that was really involved in the feudal system, so far as it was lawful or legitimate. This appears plainly from a passage in the *Leges Henrici Primi*, c. xiv., De relevacionibus. This, in the first place, is taken entirely from the Laws of Canute, c. 72, which, as already shewn, disposes entirely of the idea of any sudden change of tenures at the Conquest. In the laws of Canute and of Henry alike, the reliefs are described as those of earls—called comites in the Latin version of Henry—and king's thanes, or barons, who, as Lord Coke says, whether king's thanes—*i. e.*, those who held lands of the king—or “thanes mediocres,” held as knights, by the obligation to military service when required for the defence of the realm. No doubt, after the Conquest, the tenure by military service was developed, and indeed abused and perverted, into the system of exaction known as the “feudal system;” and this indeed appears from the laws of Henry, for the charter states, “Si quis baronum meorum sive aliorum qui de me tenent, mortuus fuerit, heres suus non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevacione relevabit eam. Similiter et homines baronum meorum, legitima et justa relevacione relevabunt terras suas de dominis suis.” So as to marriages, “Et si quis baronum vel hominum meorum filium suam nubitum tradere voluerit, sive sororem, mecum inde loquitur. Sed neque ego aliquid de suo pro hac licencia accipiam, neque ei defendam quin eam det, excepto si eam jungere vellet inimico meo. Et si mortuo barone vel alio homine meo, filia hæres remanserit, illam dabo consilio baronum meorum cum terra sua. Et si, mortuo marito, uxor ejus remanserit, et sine liberis fuerit, dotem et maritagionem suam habebit, et etiam non dabo marito, nisi secundum velle suum. Si vero uxor cum liberis remanserit, et terræ et liberorum custos erit, sive uxor sive alius propinquorum, qui justus esse debebit; et precipio ut barones mei similiter se contineant erga filios, vel filias, vel uxores hominum suorum” (*Leges Hen. Pri.* c. 1.; *A.-S. Laws*, c. i. p. 499). This shows that the pretended incidents of the feudal system, beyond reliefs (which were rendered before the Conquest), were mere abuses and usurpations, and recognised as such, so soon after the Conquest as the reign of Henry I. It also shows that there could not have been any such general alteration in the tenures of the kingdom as the author appears to have supposed, and he himself elsewhere in a note contests the notion that the feudal system was in this country established so fully as it existed abroad. *Vide post*, p. 79, *in notis*.

These were the fruits and consequences the king expected to receive from the doctrine of tenure; these he demanded as lord from his tenants; and they, in the character of lords, exacted many of the like kind from theirs. In this manner was the feudal bond riveted on the landed property of the whole kingdom.

Thus far of the nature of tenures in general: but tenure was of different kinds two kinds; tenure by *knight-service*, and tenure in of tenure. *socage*. Tenure by knight-service was, in its institution, purely military, and the genuine effect of the feudal establishment in England: the services were occasional, though not altogether uncertain, each service being confined to forty days.<sup>1</sup> This tenure was subject to *relief*, *aid*, *escheat*, *wardship*, and *marriage*. *Socage* was a tenure by any conventional service not military (a). Knight-service contained in it two species of military tenure; *grand* and *petit serjeanty* (b). Under tenure in socage may be ranked two species; *burgage*, and even *gavelkind*, though the latter has many qualities different from common socage. Besides these, there was a tenure called *frankalmogne* (c). This was the tenure by which religious houses and religious persons held their lands; and was so called, because lands became thereby exempt from all service except that of prayer and religious duties. Such persons were also said to hold *in liberâ elemosynâ*, or in free alms.

Thus far of free-tenure, by which the *liberi homines* of the kingdom became either tenants by knight-service, or in common

(a) Any certain service, so that the service be not knight-service, as rent (*Littleton*, c. v.). It is said that the reason why such tenure is so called is because *socium est servitium sociæ*, and "*soca idem est quod caruca*," a soke or plough. "In ancient times a great part of the tenants, who held of their lords by socage, ought to come with their ploughs to plough and sow the demesnes of their lords. And for that such works were done for the sustenance of their lords, they were quit against the lord of all manner of service. And because the services were done with their ploughs, the tenure was called tenure in socage. And afterwards these services were changed into annual rents, but the name remains. And if a man holdeth of his lord by escuage certain, it is tenure in socage, and not knight-service. But where the sum the tenant shall pay for escuage is uncertain, it is knight-service (*Ibid.*). And where the tenant is to pay a certain sum for castle-gard, it is socage tenure; but if he has to do castle-gard, it is knight-service." (*Ibid.*)

(b) This is an error. Tenure by *petit serjeanty* was where a man held of the king to yield to him yearly a bow, or a sword, or a dagger, or a lance, or a pair of gloves, or spears, or an arrow, or to do such several things belonging to war; and such service is socage in effect; because the tenant ought not to go, nor to do anything in person, touching war, but only to render certain things. And both species of serjeanty were only tenures of the king (*Littleton*, c. ix.), but knight-service might be of any lord (c. iv.). Again, *grand serjeanty* for the most part was for service within the realm; knight-service might be out of the realm (*Ibid.*, c. viii.).

(c) Here again the author confounds two different distinctions. Tenure in *burgage* could not be tenure in socage, which was plough-service, but it was of its nature, being certain; and as socage often was commuted for rent, for it was tenure in an ancient borough, under a rent to the king. *Gavelkind* was a customary right of descent, under which all the sons took, and related to the inheritable quality, not to the mode of tenure, or nature of services, though no doubt, for an obvious reason, *gavelkind* would always be socage.

<sup>1</sup> Wright Ten. 140.

socage. It is thought that the condition of the lower order of *ceorls*, who among the Saxons were in a state of bondage (a), received an improvement under this new polity. Nothing is more likely<sup>1</sup> (b) than that the Normans, who were strangers to any other than a feudal state, should, to a certain degree, enfranchise such of those wretched persons as came into their power, by permitting them to do *fealty* for the scanty subsistence which they were allowed to raise on their precarious possessions; and that they were permitted to retain their possession on performing the ancient services (c). But, by doing fealty, the nature of their possession was, in construction of the new law, altered for the better; they were by that advanced to the character of *tenants*; and the improved state in which they were now placed, was called the tenure of *villennage* (d). Elevated to this consideration, they were treated with less wantonness by the lords, who, after receiving their *fealty*, could not in honour or conscience deprive them of their possessions, while they performed their services. But the conscience and honour of their lord was their only support. However, the acquiescence of the lord, in suffering the descendants of such persons to succeed to the land, in a course of years advanced the pretensions of the tenant in opposition to the absolute right of the lord; till at length this forbearance grew into a permanent and legal interest, which, in after-times, was called *copyhold tenure*<sup>2</sup>.

Villennage.

Copyholds.

(a) This is an error. *Vide ante*. The *ceorls* were not slaves.

(b) Nothing in the world less likely than that the conquerors should seek to do good to any class; on the contrary, Bracton tells us that in many cases they dispossessed the former owners, and made them hold their lands in villennage (lib. i. c. 11, f. 7). So that what the Normans did was not to raise villeins into free tenants, but to make freeholders into villeins. And so the *Mirror* says (c. 1). There can be no doubt, however, that the natural effect of this was that there were a superior order of tenants in villennage, who, as Bracton says, although they held in villennage, were not villeins, and that as time went on they by degrees got their lands emancipated (they themselves becoming freemen), the tenure being turned into freehold by its being rendered certain and inheritable. Bracton indeed distinctly says the service was certain (being plough-service); and the *Mirror* says that if the lord received homage from the tenant, he became a freeholder. *Vide ante*.

(c) It has been seen that the laws of the Conqueror, confirming the customs of the country under the Confessor, simply maintained the customary rights of *ceorls*. The Conqueror declared in effect that the customary rights of the "*ceorls*" or villeins—the "*villani*" or *coloni*—should be maintained, "*Coloni et terrarum exercitores non vexentur ultra debitum et statutum; nec licet dominis removere colonos a terris dummodo debita servicia persolvant*" (*Laws of the Conqueror*, c. xxix). That these were the villeins is clear, for the next chapter calls them *nativi*, "*nativi non recedentia terris suis*," &c., and the next again calls them *coloni*, as they are called in the Latin version of the laws of Ina. The above law of William is almost a translation of an imperial edict as to the *coloni*. The effect was that these customary rights were established, so that it was afterwards held that they could not be ejected so long as they rendered their customary service (*Litt. c. ix.*).

(d) It is evident from what follows, and from other passages, that the author supposed all the *ceorls* or villeins were originally slaves, and only rose to tenure in villennage by degrees. This was not so, though no doubt in the course of time slaves rose to be villeins; but all villeins were tenants in villennage, though all tenants in villennage were not villeins, as freemen might hold lands in villennage. This is all explained in

<sup>1</sup> Wright Ten. 216.

<sup>2</sup> *Ibid.* 220.

The military service due from tenants underwent an alteration in the reign of Henry II. The attendance of a knight only for forty days, was very inadequate to the grand purposes of war ; which, besides the delay from unavoidable accidents, often consisted in many tedious operations, before an expedition could accomplish its end : while, on the other hand, that short service was highly inconvenient to the tenant ; who, perhaps, came from the northern parts of this kingdom to perform his service in a province of France.

the *Mirror*, and to understand it is one of the most important points in our legal history. The *Mirror* always distinguishes slaves from villeins, and says that villeins were "regardant," attached to manors, but that they held tillages or land in villenage. There is a remarkable passage in the *Mirror*, evidently written soon after the Conquest, and, at all events, written of that time, which shows exactly what was then the state of tenures. In the time of the first conquerors, it is said the earls were enfeoffed of earldoms, barons of baronies, knights of knights-fee, *villeins of villenages*, burgesses of boroughs, whereof some received their lands, to hold by homage and by service for all time of the realm ; and some by villein customs, as to plough the lord's lands, to reap, cut, and carry his corn or hay, and such manner of service (*Mirror*, c. ii. s. 28). It appears that the services of the villeins varied ; some plough-service, some to carry corn or manure ; but all the tenants held some tenements in villenage, if it was only their cottages, for they all lived upon the manors, and all alike were tenants of manors ; but these customs differed, and whether the custom was to render service, which was low and vile, or honourable, as plough-service, the tenure was tenure in villenage. But plough-service being of a higher character, and requiring some skill as well as labour, those who paid in such service gradually rose to be freeholders ; and all freehold tenure was originally, when not military, in socage. The truth is, that all through the Saxon times there had been a gradual, progressive improvement in society, and there can be no doubt that the "ceorls" had become, many of them, tenants in socage, or freeholders, and the villeins had become by enfranchisement free tenants of manors, and the theows, or slaves, had become villeins. This progress in society is one of the most interesting features in the legal history of those times. Our common freehold estates arose out of villenage. The passage above cited from the *Mirror* bears internal evidence of having been written soon after the Conquest, and, at all events, clearly refers to that time ; and it shows that at the time of the Conquest there were no freehold tenures, save either such as were military, or arose out of villenage, for freehold tenures are not mentioned in the above enumeration as a distinct tenure. And it also appears that the process of gradual emancipation of the land of the villeins, and alteration by usage into freehold land, had begun before the Conquest, and it would seem that under the Confessor it was promoted and extended, as he ordered a careful record to be made of those who held by plough-service, which was the origin of these freeholds ; but that after the Conquest many of these freeholders were coerced into villenage again. This remarkable passage fully illustrates what historians have in vain sought to explain—the anxiety the great body of the people showed for the maintenance of the customs of the Confessor, *i.e.*, the customs existing in his time. They were the customs by which the people held their lands. Our copyholds arose out of villenage. There is another passage in the *Mirror*, which clearly shows that the villeins were copyholders, even though of the lowest order. "Another thing to be noted is that no more than the long tenure of copyhold land maketh a freeman a villein, the long tenure of land maketh a villein a freeman, for freedom is never lost by prescription or lapse of time" (c. ii. s. 22). And again, it is there said that a man might say in his claim of villenage that the services he did were rendered for the service of villein lands which he held, and not by service of blood (*Ibid.*). Elsewhere it is laid down that those are villeins who are born in that state, or adjudged to be so in a suit *de nativo habendo* (*Ibid.* c. xi. s. 28). It is obvious that as there were no new creations of villenage after the last conquest by the Normans, both the modes resolved themselves into the former, the suit only being the legal way of adjudging that a man was a villein by birth ; and there could at that time be no villeins but by birth. Perhaps they were originally slaves, but in the *Mirror* it is carefully laid down, that all villeins are not slaves, though attached to the land (*Ibid.*).



Sensible of these inconveniences, Henry II., in the fourth year of his reign, devised a commutation for these services, to which was given the name of *escuage*, or *scutage* (a). Of escuage. He published an order, that such of his tenants as would pay a certain sum, should be exempted from service, either in person or by deputy, in the expedition he then meditated against Thoulouse. This sort of compromise was afterwards continued; and *tenure by escuage* became a new species of military tenure, springing from the advantage some tenants by knight-service had taken of this proposition<sup>1</sup> made by the king.

In the same reign, a remission of the old service, which had in some degree been conceded by Henry I. (b) was ratified to socage

(a) This had already arisen out of tenure by knight-service, and what Henry did was to compound for the commutation. Originally, if a knight failed to attend, his feud was seized; afterwards, this was changed into an escuage or scutage, *i.e.*, a fine levied *per scutagium*: and, in like manner, the knight could levy escuage on his military tenants. It became a practice after the Conquest to essoin or excuse their personal attendance, as on the ground of sickness, &c., a phrase afterwards imported into legal proceedings, with reference to excuse for non-attendance in court upon legal process, and in this sense it is used in *Leges Hen.*, c. xli. s. 2, "Qui ad hundredum sub monitus non venerit, nisi soinus legalis eum detinet," &c. (*Anglo-Saxon Laws*, v. i. p. 549). So as to summons of a person out of the county a certain time was allowed, "Et ultra non procedit ubicunque fuerit in Anglia, nisi competens detineat eum soinus" (*Ibid.*, c. xli. lxi.; c. vii.). "Si qui ad comitatum venire noluerit, nisi competens soinus eum detineat," &c. (*Ibid.*, c. xxix. s. 3). But though the common law was that the tenant might excuse his personal attendance, he was bound to find a substitute, as was decided in a case cited by Littleton, *temp.* Edward III., and hence the commutation or composition made by Henry I. (*vide Littleton*, c. iii). Afterwards the scutage was assessed by the barons, before they went on the war, and ultimately it was assessed by parliament. The barons could levy escuage upon their tenants, and there are instances of distringases for it (*Madd.*, 470, 471). There were talliages assessed on the tenant in ancient demesnes, and on the tenants in burgage. These also were at first assessed by the king's officers, but ultimately all these impositions were assessed by the representatives of these various bodies, assembled in the common council of the realm, which led to a parliament.

(b) The author gives no reference; but probably refers to the charter of Henry confirming the customs of the country. This is the proper place to present an analysis of the *Leges Henrici Primi*, which are above alluded to, and have already been mentioned as quoted by our author, but of which he gives no account, and of which, it is plain, he had only derived his knowledge at second-hand, through some citations of it in other works; as, for instance, in Hale. Had he read them, they would have preserved him from many errors. He has sometimes attempted to represent them as worthless, on the ground that they were probably compiled after the death of the king whose name they bear, an obvious fallacy, already exposed with reference to the compilation of the laws of the Confessor, which no doubt was made under the Conqueror, but is none the less authentic on that account. Hale treats the compilation as authentic, and says, "these laws of Henry I. are a kind of miscellany, made up of the ancient laws of the Confessor and the Conqueror, and certain parts of the canon and civil law, and of other provisions which custom and the prudence of the king and council had thought upon, chosen, and put together" (*Ibid.* 161). And this may have been so, although the actual compilation was not made until after the close of the reign. Elsewhere Hale calls these laws of Henry I.; "obsolete, and disordered, and confused, rather than settled legal institutions;" and no doubt this is true, and the law was in a state of transition. Still, no doubt, it contains a great deal of what was law at the time; and Hale cites it, for instance, as to the law of descent (*Ibid.* 224); so the author cites it once or twice—his quotations, however, being evidently borrowed from Hale, he himself making no other citations from the laws. No doubt,

<sup>1</sup> A.D. 1159. *Vide* Spelm. Cod. in Wilk. Leg. p. 321.



tenants ; who grew now into the habit of paying a certain sum in money instead of rents in kind.

Consequences of tenure. Having so far considered the quality or conditions of tenure, as introduced by the Norman system ; let us now examine the nature of that *estate* or interest a person might

it is not entirely a collection of *laws* : it is also a treatise upon or exposition of the laws as then understood—in that respect resembling the treatise of Glanville ; but it is *also* a collection of laws, and one of great interest and importance, as illustrating an important period of transition in the history of our laws, between the barbarism of the Saxon institutions and the more advanced developments of Glanville and Bracton, in the reign of Henry II. The compilation begins with the charter of Henry I., which commences with a confession of exactions and oppressions, civil and ecclesiastical, of great constitutional importance :—“ *Quia regnum oppressum erat injustis exactionibus, ego sanctam Dei ecclesiam liberam facio ; ita quod nec vendam nec ad firmam ponam, nec, mortuo archiepiscopo, sive episcopo, aliquid accipiam de dominio ecclesiarum vel hominibus ejus, donec successor in eam ingrediatur. Ex omnes malas consuetudines quibus regnum Anglia opprimebatur inde aufero, quas malas consuetudines ex parte suppono.*” Then came the confession of feudal exactions already mentioned. Next comes a most important provision as to inheritance by testament or intestacy :—“ *Si quis baronum vel hominum meorum infirmabitur, sicut ipse dabit, vel dare disponet pecuniam suam, ita datam esse concedo. Quod si ipse preventus, pecuniam suam non dederit, nec dare disposuerit, uxor sua, sive liberi, aut parentes, aut legitimi homines ejus, eam pro anima ejus dividant, sicut eis melius visum fuerit.*” In a subsequent chapter of the “*Laws*,” there is this, which our author, after Hale, quotes as law at the time, though it has escaped their observation that this chapter is headed “*Consuetudo West Saxe* :”—“ *Primo patris feodum primogenitus filius habeat, emptiones vero vel deinceps adquisiciones suas det ecu magis velit. Si bocland habeat quam ei parentes dederint, non mittat eum extra cognationem suam.*” —(*Leges Hen. Pri.*, c. lxx. s. 21 ; *A.-S. Laws*, v. i. p. 575). Then come the provisions as to military service, already extracted, and then the general confirmation of the laws and customs of the Confessor, with the alterations of the Conqueror. This would include the customs of socage and villenage, and perhaps may be what the author alludes to. The next chapter contains the charter to the city of London. Then follow a great many chapters, nearly a hundred in number, all of them of some length, and containing often as many as twenty heads and sections, in which, no doubt, are combined actual laws (as, for instance, that as to intestacy, c. lxx., already extracted), and likewise *expositions* of the grounds and principles of law as then understood and applied : these portions borrowing largely from the Roman and canon law—whole passages being copied therefrom, and entire edicts set out. All this illustrates the Roman origin of our law, because the treatise of Glanville, which is built upon the foundations thus laid down, along with that of Bracton, borrowed from Justinian, form, it is admitted, the bases of our common law. It is, of course, impossible to do more than give an analysis of this elaborate compilation ; but it is necessary to point out that it deals copiously with procedure, civil and criminal, courts, jurisdictions, &c. The general tenor of it supports the account given by Lord Hale, that the king composed the collection (*i.e.*, caused it to be composed), and *added* his own laws, “*whereof some seem to taste of the canon law.*”—(*Hist. Com. Law*). As to which, it may be said, that they more than “*taste*,” seeing that entire chapters are taken from the civil or the canon law, especially as to the nature of jurisdictions, of judicature, and of procedure. Thus, c. iii., “*De Causarum Pertractione vel Distinctione*,” treats of the nature of causes, and so of the next head ; then s. 5, “*De Causarum Proprietatibus*.” These seem rather in the nature of expositions of principles ; 6 treats of the division of counties, &c. Then, s. 7, “*De Generalibus Placitis Comitatum* :”—“*Sicut anti qua fuerit institutione formatum salutari regis imperio, vera nuper est recordatione firmatum, generalia comitatum placita certis locis et vicibus et diffinito tempore, per singulas Angliæ provincias, convenire debere, nec ullis ultra fatigationibus agitare, nisi propria regis necessitas, vel commune regni commodum sepius adjiciat. Intersint autem episcopi, comites, barones, &c., diligenter intendentes, ne malorum impunitas, vel graviorum pravitas, vel judicium subversio, solita miseros laceratione conficiant. Agantur itaque primo debita vere Christianitatis jura, secundo regis placita, postremo causæ singulorum dignis satisfac-*

have in land, together with such incidents of ownership as naturally occur upon reflecting on property. The polity of tenures tended to restrict men in the use of that, which, to all outward appear-

tionibus expleantur, et quoscunque scyresmot discordantes inveniet, vel amore congreget, vel sequestret iudicio . . . Si uterque necessario desit, prepositus et sacerdos, et quatuor de melioribus villæ assint pro omnibus, qui nominatim non erunt ad placitum submoniti. Idem in hundredo decrevimus observandum, de locis et vicibus, et iudicium observantiis, de causis singulorum justis examinationibus, audiendis, de domini et dapiferi, vel sacerdotis et meliorum hominum præsentia" (c. vii.). All this refers to the courts of the country and the hundred. But in a subsequent chapter (iii.) the *county court* is called *curia regis*. The next relates to the court of the hundred, and of Decennaries:—"Presit autem singulis hominum novenis decimus, et toti simul hundredo unus de melioribus, et vocetur aldermanus, qui Dei leges et hominum jura vigilanti studeat observantia promovere;" whence we see how ancient is the usage of aldermen sitting as magistrates; and it is to be observed, that although in our days the office and the phrase are applied only to municipal magistrates, in ancient times they applied equally to rural; and, as Lord Coke long afterwards explained, a "ward in a city is as a hundred in a county." Thus, then, the Saxon system of local administration of justice was distinctly upheld; and one of the most interesting and important questions arising upon these laws, is whether they afford any trace of *any other* courts for the administration of ordinary justice between subject and subject, and especially of the establishment of a *curia regis* for that object. Then comes a chapter (ix.), "De Qualitate Causarum," which distinguishes the nature of various causes, and as to ordinary causes says:—"Et omnes causas terminetur vel hundredo, vel comitatu, vel halimoto, vel dominorum curiis," i.e., either in courts-baron, or the hundred courts, or the county courts (s. 4.). And in conclusion, it points out how some causes concern the king: "Soca vero placitorum alia, proprie pertinet ad fiscum regium, et singulariter, alia participatione, alia pertinent vicecomitibus et ministris regis, in firma sua, alia pertinent baronibus socham et sacham (i.e., domestic jurisdiction), habentibus." Then c. x., "De Jure Regis," treats of causes which concern the king, and his rights:—"Hæc sunt jura quæ rex solus et super omnes homines habet in terra sua, commoda pacis et securitatis institutione retenta, infractio pacis regis—murdrum, utlagaria (outlawry) incendium, robaria, &c., injustum iudicium: *defectus justitiæ*"—an important head, under which a large number of cases were brought into the king's superior courts when they were established, on the ground of a failure of justice in the local tribunals:—"Hæc sunt dominica placita Regis: nec pertinent vicecomitibus vel ministris ejus, sine difinitis prælocutionibus in firma sua." Then, c. xi., "De Placitis Ecclesiæ pertinentibus ad Regem," treats of ecclesiastical causes coming under the jurisdiction of the crown:—"Sunt alia quædam placita Christianitatis in quibus rex partem habet," and then it contains many, considered common to the king and the bishops, as some cases of tithes, withholding of Rome's fee (Peter's pence), and church scots, the killing of ecclesiastics, &c. Under this head occurs the following, very important with reference to subsequent disputes, as a recognition of the canon law:—"Qui ordinis infracturam faciet, emendet hoc, secundum ordinis dignitatem; Ubi cumque recusabitur lex Dei justè servari, secundum dictionem episcopi, cogi oportebit per mundanam potestatem; et omnis emendatio communiter emendatur Christo (i.e., by the church), et rex." This is explained to mean that the king may take pecuniary penalties, "permissum est pecuniam emendationem capere, secundum legem patriæ," that is, if the act were at once an offence against the secular law and the ecclesiastical. The lay and spiritual tribunals might both proceed according to their respective jurisdictions, and that of the latter would be enforced by the former. And in another chapter (xxi.), the same thing is expressed, that the king has a part in these classes of cases, "Si cogi oporteat per mundanam potestatem, ut rectum fiat" (*A.-S. Laws*, v. i. p. 528.) All this, be it observed, is mainly a compilation of the Saxon laws upon the subject, which, according to the Conqueror's charters, were all confirmed. After another chapter on a similar subject, comes one to which the Norman sovereigns attached great interest, and which became the subject of gross extortions, and therefore the subject of a clause in Magna Charta:—"Quæ placita mittunt homines in misericordiæ Regis," i.e., made them liable to fine or amercement at the suit of the king. "Hæc mittunt hominem in misericordia regis, infractio pacis, contemptus brevium suorum, utlagaria; et qui eam faciet in jure regio sit, et si bocland habeat, in manum

ance, was their own. When the land of the Saxons was converted from allodial to feudal, as above described, it could no longer be alienated without the consent of the lord, nor could it be disposed of

*regis veniat, furtum probatum, et morte dignum: et murdrum.*" Then the clause as to reliefs is precisely the same as Canute's law on the subject, which seems to show that the system of military service was not altered. Then c. xvi., "*De Pace Curie Regis,*" at first sight might seem to relate to a court of justice; but it is very clear that it does not so, as it makes no allusion to a tribunal, and merely alludes to the limit within which an offence of violence, committed within the precincts of the royal residence, shall be deemed an infraction of the peace of the king. "*Tam longe debet esse pax regis a porta sua ubi residens erit,*" &c. (c. 16.) After one or two others of no importance comes c. xix., "*De Justitia Regis,*" *i.e.*, quæ ad justitiam vel indulgentiam regis et fiscum censentur, cum appendiciis suis; nec, sine diffinitis prælocutionibus pertinent vicecomitibus, vel prepositis ejus, in firma sua." Then c. xxiv., "*De Judiciis Fiscalis Juræ,*" says that "Super barones socnam suam (domestic jurisdiction) habentes, habet judex fiscalis justitiæ legis observantiam, et quicquid peccabitur in eorum personam; nemo enim forisfacturam sui ipsius habuit sed fortasse dominus ejus;" c. xxv., "*De Privilegiis Procerum Angliæ,*" (in which Spelman thinks the Proceres mean the lords of manors) "*si exurgat placitum inter homines alicujus baronum socnam habentium, tractetur placitum in curia domini sui, de causa communi,*" *i.e.*, in the county court, which, in c. xxxi., is called "*curia regis.*" Then, in c. xxix., "*Qui debent esse Judices Regis,*" "*regis judices sunt barones comitatus*" (which Spelman and Coke consider to mean the freeholders of the county) "*qui liberas in eis terras habent, per quos debent causæ singulorum tractari,*" as opposed to villeins and mean persons. And then it enacts that "*Qui ad comitatum secundum legem submonitus, venire voluerit, culpa sit,*" &c. Then, c. xxxi., "*De Capitalibus Placitis,*" is very remarkable as to the judicature of the time: "*In summis et capitalibus placitis unus hundredus vel comitatus judicetur a duobus, non unus dños judicet. Si inter judices studia diversa sint, ut alii sic, alii aliter fuisse contendat, vincat sententia meliorum, et cui justitia magis acquieverit. Interesse comitatu debent episcopi, comites, &c., quæ Dei legis et seculi negotia justa consideratione diffiniant Recordationem curiæ regis nulli negari liceat, alias licebit, per intelligibiles homines placiti: unusquisque per pares suos judicandus est, et ejusdem provinciæ."* This shows that the county court was called "*curia regis,*" and that in it sat the bishops and the barons, as judges, but that they were not the triers, and it was open to them to have the aid of jurors or witnesses, upon whose findings they could determine. Indeed, it is clear, that causes were tried by the vicinage. Thus in c. xxxiii., "*De Placiti Tractando;*" "*Si quis in curia sua vel in quibuslibet agendorum locis, placitum tractandum habeat, convocet pares et vicinos suos, ut inforciato judicio, gratuitam, et cui contradicere non possit, justiciam exhibeat. Defectus quippe justitiæ, et violenta recti eorum destitutio est, qui causas protahant in jus regium."* Here we see very clearly exhibited the benefits and the faults of the local system of judicature then existing—the benefits of local knowledge, and the mischief of local partisanship. So, in c. xxxii., "*De Placito Tractando in Justo Judicio.*" Another, c. xli., shows that a man could be summoned in one county to a suit in the court of another, the time for appearance being lengthened according to the distance from the court—whether one, two, three, or four shires intervened. So much as to the local jurisdiction of the old local tribunals. But in subsequent chapters there appear to be allusions to the jurisdiction of the justices itinerant, who, we know from records in the Exchequer, went their circuits regularly at least as early as the 18th of Hen. I., and whose itinera had certainly commenced under the Conqueror, in whose reign several cases occurred of trials in the county court before the king's justiciaries (*vide post*). In c. xlii. there is mention made of summons "*a rege vel justicia ejus.*" So c. xlv., "*Si quis a domino suo vel justicia implacitetur.*" And c. liii., "*Qui secundum legem submonitus a justicia regis ad comitatum venire supersederit, reus sit,*" &c., which appears to refer to the summonses issued by the justices itinerant. It appears from various other chapters that the king's justices—perhaps itinerant justices—took cognisance of the pleas of the crown. Thus, c. lii., "*De proprio placito regis. Si quis de placito proprio regis implacitetur a justicia ejus, non debet justiciæ vadium recti denegare.*" It appears from other chapters that it was well established that pleas could only be taken in the counties. Thus c. xlv., "*Si quis a justicia implacitetur, submoneatur in eodem comitatu.*" Hence it would

by will. These, with other shackles, sat heavy upon the possessors of land; nor were at last removed, but by frequent and gradual alterations, during a course of several centuries. The history of

be necessary to send justices of the king into the counties, and therefore it would be necessary that they should have power to summon the men of the county; and thus it is provided, "Qui secundum legem submonitus a justicia regis ad comitatum venire supersederit reus sit," &c. (c. liii.) "Clericus per consilium prelati sui vadium dare debet, cum dederit in accusatione" (c. lii.) The hundred court was to be held monthly, and the county court twice a year, like the modern circuits (c. li.) No one without legal authority was either to take or to rescue distresses, or what would in later times have been called levies under a distringas, in order to enforce appearance. "Nulli sine iudicio vel licentia, naniare liceat alium in suo vel alterius. Nemo justiciæ vel domino sum namium excutere presumat, si justus vel injustus coajuatur, sed juste repetet plegium offerat et terminum satisfaciendi. Si vicecomes namium capiat, ad propinquoem regis curiam dimittat, nec vendat ipsa die (c. li.) Si quis vadium recti justiciæ denegaverit, tertio interrogatus, overseunesse culpasit, et ex iudicio licet retineri eum, donec plegios inveniat, vel satisfaciat" (c. lii.), where we see the origin of outlawry, arrest, and bail. Then there is a chapter about settlement of copartnership accounts (c. lv.); and another as to how differences are to be settled between landlords and their tenants, whether as tenants of the manor, or as lessees; and how complaints against stewards of manors are to be tried (c. lvi.) Then there is a chapter as to differences between neighbours as to boundaries, which are to be settled either in the lord's court or the hundred—some enactment analogous to which might be very beneficial in our own times. These specimens may suffice to show that this compilation of laws mark an important era in our legal history, and are indicative of a state of transition to a higher development of law. It would be difficult to find any later laws of which the germs are not to be found in this compilation. It is to be observed that this compilation is not the only source from which laws of Henry I. may be collected. In the *Mirror of Justice* there are several laws of Henry I. mentioned, as that those who survived their wives who were with child by them should hold their wives' inheritance for ever" (c. i. s. 34); which is quite different from the "tenancy by the courtesy," as it afterwards was settled. So it is stated as to civil procedure, that whereas it was at first defined that plaintiffs should have security, Henry I. put the mitigation in favour of poor plaintiffs, that it should be according to their ability (*Ibid.*) So it is stated, that in the time of Henry I. it was ordained and assented to that jurors sworn upon assizes and the like, should not take fees (*Ibid.* c. ii. s. 14), which shows that juries were, in his time, used in civil cases. So, as to process in civil actions, it is said that it was ordained by Henry I. that offenders should first be arrested until they found bail, and then distrained by their lands to value of the demand; and if they then made default, that their land should be delivered to the plaintiff until they had made satisfaction (s. 24), which is remarkable as showing that the subsequent statutes as to arrest and bail, only followed a previous practice. Afterwards it is stated, that in personal actions defaults were to be punished thus: that defendants were distrained to the value of their demand, and afterwards, for default after default, judgment was given for the plaintiff. This usage was changed in the time of Henry I., that no freeman was to be distrained by his body for an action, personal, venial, so long as he had lands; in which case the judgment by default was of force till the time of Henry III., that the plaintiff should receive his seisin of the land, to hold until satisfaction was made (c. iii. s. 5). Several laws of Henry I. are mentioned in the *Mirror* as to criminal procedure. Thus it is said that Canute "used to judge mainpernors according as their principals, when their principals appeared not in judgment;" but Henry I. made this difference, that the ordinance of Canute should stand against mainpernors who were consenting to the fact (c. ii. s. 15). So it is mentioned that he moderated the law as to forfeiture of lands on conviction of felony (*Ibid.*). These citations are of interest, as showing the law in a course of gradual progress and development, by means of judicial decisions, or legal ordinances of the king in council. It is stated in the *Mirror* to have been ordained by Henry I. that none should be arrested nor imprisoned for slander (*i.e.*, on charge) of mortal offence (*i.e.*, felony) before he was indicted thereof by the oaths of honest men, before those who had authority to take such indictments, and then they were to be seized by their bodies and kept in prison till they cleared them-

these alterations in the descent, alienation, and other properties of feuds, is wrapt in obscurity during this early period ; however, we will endeavour to trace such circumstances relating to it, as can be collected from the scanty remains of antiquity.

Of primogeniture. By the introduction of tenures, there is no doubt but *primogeniture*, or a descent of land to the eldest son, began to prevail ; yet it is found, that as low down as the reign of Henry I.,<sup>1</sup> the right of primogeniture was so feeble, that, if there were more than one son, the succession was divided, and the eldest son took only the *primum patris fœdum* ;<sup>2</sup> the rest being left to descend to the younger son or sons : but this soon went out of use, or was altered by some statute now lost ; for in the reign of Henry II. the eldest son was considered as sole heir : and so fixed was his right of succession to an inheritance held by his ancestors, that it could not be disappointed by alienation. Thus stood the law with regard to tenures by knight-service ; but the same reasons not holding with respect to socage-lands, they were not subject to the same law ; for so late as the reign of Henry II. the sons succeeded to socage-lands *in capita* equally ; but the capital messuage was to go to the eldest son ; for which, however, he was to make proportionate recompense to the others. But this partible inheritance in socage-land was not universal ; for, if it was not by custom divisible,<sup>3</sup> the eldest son was heir to the whole. Both in knight's-service and socage, if a person died leaving only daughters, they all succeeded jointly and equally, the capital messuage being given to the eldest daughter, upon the terms above-mentioned.

selves of the charge before the king or his justices (book i. c. ii. s. 20) ; a most important law, remaining to this day, save so far as it is altered by the statutable power of justices of the peace, a change which belongs to the age of Edward I. It may be convenient here to mention the subsequent charters, up to Henry II. (*See Blackstone's Charters.*) Stephen, at his accession, granted a charter that the church should be free, and that he would not act in ecclesiastical affairs uncanonically, and that the dignities and customs of churches, as held by ancient tenure, should remain inviolable ; and that, while episcopal sees should remain vacant of pastors, they and all their possessions should be committed to the care and keeping of ecclesiastics, or other honest men of the church, until a pastor should be canonically appointed. He declared that he would abolish all injustice and exactions introduced by sheriffs or others, and that he would observe and cause to be observed all the good and ancient laws and customs in civil or criminal matters. He also granted another charter, which granted and confirmed to the barons and people all the liberties and good laws and customs which had been confirmed by Henry I., and were held in the time of the Confessor. Henry II. granted a charter briefly to the like effect : " I have granted and restored and confirmed to the church, and to all my barons and tenants, all the customs which Henry I. granted to them. In like manner, all evil customs which he abolished, I grant to be abolished. And I will that the church, and all my barons and tenants, do hold all their usages, liberties, and free customs freely and peaceably, and as freely and fully and securely as Henry I. confirmed to them by his charter." To understand the " evil customs " as to the laity, it is only necessary to refer back to the charter of Henry I. To understand the " evil customs " as to the church, it is necessary to mention that the Conqueror and his sons were in the habit of keeping sees vacant for years, in order to take the revenues. At the death of William I. he held several sees so vacant (*Lingard*, vol. i. p. 272 ; vol. ii. c. 3.)

<sup>1</sup> *Leges* 17.

<sup>2</sup> *Hale's Hist. Com. Law*, 255.

<sup>3</sup> *Si non antiquitus divisum*. *Glanv. lib. 7, c. 3.*

The right of *representation* in prejudice of proximity of blood, though, perhaps, not an unlikely consequence of the legal notion of primogeniture, did not so soon establish itself. The minds of men revolted at a rule which gave the inheritance to an infant, only because he represented the person of his father, in exclusion of the uncle, who was nearer of blood to the grandfather, from whom the fee descended ; especially when regard must be had to the calls of military service, which an infant tenant was not capable of performing. If to these considerations we add the little tenderness that was shown to the titles of such feeble claimants in those days of violence and oppression, we can easily account for the slow progress which was made towards establishing the right of representation.

With all these reasons against it, representation was not admitted as a rule of descent, even so low down as the reign of Henry II. Glanville states this very point, as a matter concerning which there was a variety of opinions in his time. A man, says he, dies leaving a younger son, and a grandson by his elder son ; and it was a question between the son and the grandson who should succeed. Glanville seems to think, that if the eldest son had been *forisfamiliated*, that is, provided for by a certain appointment of land at his own request, the grandson should have no claim against his uncle respecting the remainder of the inheritance of the grandfather ; though perhaps the eldest son might himself, had he survived.<sup>1</sup>

As the descent of crowns kept pace with the descent of private feuds, we may, from this doubt in Glanville, be able to account for the conduct of king John in excluding his nephew Arthur from the throne ; and from the different opinions which were then held concerning it, we may collect, that he had some colour of right and law for what he did ; the rules of inheritance, as to the point then in question, not being precisely ascertained and settled. In France, where the right of representation had more generally obtained, that king was clearly esteemed an usurper ; and as such, his title denied and opposed. In England, where that mode of descent had not yet been fully fixed, he was more generally held to be in lawful possession ; or, at least, the objection to his right was such as admitted much debate and question. At what precise time these doubts were removed, and representation became universally regarded as a rule of descent, can only be conjectured. Probably, in the latter part of this very reign, when such a notorious event was recent, and had brought the subject under examination, our law of descents received this new modification from the Continent.<sup>2</sup>

When the succession of collaterals first took place, and when representation amongst collaterals, is involved in equal obscurity ; we only know, that in the time of Henry II. the law was settled in this manner. In default of lineal descendants, the brothers and sisters came in ; and if they were dead, their children ; then the

<sup>1</sup> Lib. 7, c. 3.

<sup>2</sup> Dalr. Feud. 212.

uncles,<sup>1</sup> and their children; and lastly, the aunts,<sup>2</sup> and their children: observing still the above distinction between knight's-service and socage, and between males and females.<sup>3</sup>

The law of feuds prevailed in this country as a custom, grounded upon the admission of the 52d and 58th laws of William the Conqueror. The particular rules and maxims of it gained footing imperceptibly, borrowed perhaps from foreign systems, but more commonly deduced by the analogy of technical reasoning. The effect of them upon our land is seen and known; but their source, or the time of their origin, is too remote and obscure to be pursued at this day.<sup>4</sup>

The restraint on alienation was a striking part of the feudal polity. This restraint was partly in favour of the superior lord, and partly in favour of the heir of the tenant. Whichsoever of these considerations imposed the first restriction, it is certain the first relaxation of it contained a caution that regarded the interest of the heir. A law of Henry I. says, *Acquisitiones suas det cui magis velit; si Bocland autem habeat, quam ei parentes sui dederint, non mittat eam extra cognationem suam.*<sup>5</sup> This permission, which enabled a man to disappoint his children of his lands *purchased*, was qualified in the time of Henry II.; for then it was laid down for law, that a man should alien only part of his purchased land, and not the whole, because he should not *filium suum hæredem exhæredare*. But if he had neither son nor daughter, he might then alien a part, or even the whole, in fee.<sup>6</sup> And though he had children, he might alien all his purchased lands; *provided* he had also lands by inheritance, out of which his children might be portioned. It was thought reasonable, that a man should have liberty to dispose of such lands as he had, by his own purchase, procured to himself; but the genius of this law would not so far dispense with its usual strictness, as to allow him altogether to disinherit his children.

The alienation of purchased lands led to the alienation of lands coming by descent; but this was under certain qualifications, and not without the like restraints, which we have before mentioned in the case of purchased lands. Part only of an inheritance, which had descended through the family, could, in the reign of Henry II., be given to whomsoever the owner pleased; so that, upon the whole, a person in his lifetime might, in some cases, dispose of all his purchased lands, and a reasonable part of those taken by descent, but could give neither of them by will.<sup>7</sup>

It is an opinion, that<sup>8</sup> alienation first became frequent in burgage-tenures (a). It seems as if the holding in them was never

(a) "Tenure in burgage is where an ancient borough is of which the king is lord, and they that have tenements within the borough hold of the king, that every tenant

<sup>1</sup> *Avunculi.*

<sup>2</sup> *Materterce.*

<sup>3</sup> Glanv. lib. 7, c. 4.

<sup>4</sup> *Ingressiturque solo, et caput inter nubila condit.*

<sup>5</sup> Leg. Hen. I. 70. [*Vide ante*, p. 72.]

<sup>6</sup> Glanv. lib. 7, c. 3.

<sup>7</sup> *Ibid.*

<sup>8</sup> Dair. Feud. Prop. 99.



very strict ; and, as persons living in that sort of society sooner got loose from an habitual reverence for tenure, and, from their occupation, stood in need of a more exchangeable property, it is probable alienations might happen there more early than among other tenants.

When alienations had become established in burgage-tenures, the alienation of purchased lands in many instances, and of lands, descended in some, was by degrees permitted, as we have before seen. All these alterations broke in upon the original notion of tenure and its qualities ; and in the reign of king John prevailed to such a degree, as to occasion the restrictions imposed by the Great Charter. Thus far of tenures and their incidents, of which we shall take our leave for the present.<sup>1</sup>

ought to pay to the king a certain rent. And so it is where another lord—spiritual or temporal—is lord of a borough, and the tenants of such a borough hold of their lord, to pay each a certain rent (*Littleton*, c. x.). It appears from this that the origin of boroughs were “vills,” or “towns,” terms which originally meant a house and estate in the country, the Roman “villa” being the original, and the British or Saxon “town” meaning originally a single house or farm in the country, whence to this day the phrase is sometimes used in that sense. Then, as the lord gave leave to tenants to erect houses on payment of rent, a town, in the more modern sense, arose. And so, as *Littleton* says, every borough is a town, though every town is not a borough (*Ibid.*) ; for two or three houses may make a town or township, but a borough implies something of more importance ; “for,” says he, “of such old towns called boroughs came the burgesses of the parliament when the king hath summoned his parliament” (*Ibid.*). And as the word “borough” is simply the Saxon word “borh,” or burgh, which, all through the Saxon laws, is used in the sense of an assemblage of inhabitants within the same “frankpledge,” the “boroughs” must be as old as the Saxons. On the other hand, it is manifest that many towns must be much older, especially such as are, or once were cities ; and that such places as have always been, or were anciently called cities, such as London and York, although, it may be, no longer called cities, or, perhaps, now comparatively deserted, were of Roman origin, being the “municipia,” or municipal colonies, and “civitates,” established during the Roman occupation. And, therefore, *Littleton*, ignoring, like other sages of the common law, what is of Roman origin, was in error when he wrote that boroughs are older than cities. That which distinguishes boroughs from other and more modern towns is, as he says, “ancient custom or prescription.” “And the greater part of such boroughs have divers customs and usages which be not had in other towns ; for some have a custom that if a man have issue many sons, and dieth, the younger son shall inherit within the borough, which custom is called Borough-English. And so in some boroughs by custom the wife shall have for her dower all the tenements which were her husband’s. Also in some boroughs, by the custom, a man may devise by his testament his lands and tenements within the borough. And this course is the custom. And no custom is to be allowed but such as hath been used by title of prescription—that is, from time out of mind. And many other customs and usages have such ancient boroughs” (*Ibid.*). But cities such as London and York have customs still more ancient, derived from the Romans.—*Vide Bro. Abr.* “Custom,” pl. 25, 10.

<sup>1</sup> Such is the shape which the feudal polity, after its introduction into this country, gradually assumed. [The author here introduced a long note excusing his not having entered into the foreign feudal system, concluding thus :—Feuds, properly so called, namely those at the will of the lord, were no part of the system established by William ; his famous law expressly declares that he had granted them *jure hereditario*. The uncertain casualties of tenures were soon ascertained by express charters of liberties, repeatedly granted by our Norman kings. On the death of the ancestor, the fee was cast upon the heir by construction of law, who entered as into a patrimonial, not a feudal property. Such was the law of English tenures, at their earliest appearance ; and to this it is to be attributed, that through all our law-books and reports, from Bracton to Coke, and further down, there is no allusion, no reasoning, that bears any relation to feuds or feudal law, in this sense of it ; and those who have arraigned Lord Coke for his



The judicature of the kingdom was thrown into a system conformable to the new polity (*a*). The objects which first present themselves, on contemplating the introduction of Norman judica-

(*a*) This subject, which lies at the basis of all others, as regards changes of the law during the period in question, seeing that the changes were mainly the result of judicial authority, our author has not sufficiently brought out. As already has been shown in the Introduction, it was seen that the laws could only be altered in that way, gradually and by judicial authority, and that with this view the judicature and procedure must both be improved. The difficulty was, however, that the people clung with tenacity to their old institutions, and especially to the old turbulent popular tribunals, the courts of the hundreds and the county, the evils of which are alluded to in the laws of Henry I., which have been cited, and are described by Lord Hale (*History of the Common Law*, p. 7), from whom our author borrows some passages in a subsequent page (*vide post*). The difficulty was solved in this way; the old tribunals, or at least the old *assemblies* were retained, and they were, at the same time, slowly and by degrees so far modified, as to deprive them of real power, until, at length, becoming first virtually superseded and then obsolete, they were practically, except in trivial cases, abolished. The mode in which this was effected,—which constitutes one of the most curious, interesting, and important events in the course of our legal history,—was altogether lost sight of by our author, so that, the essential point in the legal history of the period having been missed, all the rest is lost in confusion and obscurity. It was effected in this way. The sheriff, it will be recollected, presided in these assemblies, and he was the criminal judge. Criminal justice, it will be borne in mind, was, as is noticed in the laws of Henry I., necessarily local, and administered in the counties (as it is to this day), and civil justice was most conveniently so. And no doubt it was this in a great degree which made the people cling so to their local, popular, tribunals; and if they could be made to see that justice could be *better* administered, and yet by local tribunals, they would not be so likely to cling to these popular institutions. So it was managed thus. In the first place, the king appointed, as his judges, barons or knights, or ecclesiastics, men *fit* to be judges; next he appointed them *sheriffs*, so that here was one great point gained, that there were fit and proper judges both in the civil and criminal courts of the county. Of the fact there is no doubt, owing to the learned industry of Mr Foss; see many instances of it in his *Lives of the Judges*, vol. i., pp. 377, 189, 186, 264. And he shows that even chief justiciaries were sometimes sheriffs, and that a sheriff often held several counties, and for several years (*Ibid.*, pp. 264, 392, 373, 343). Or again, if the sheriff was an able man, the king made him his justice or justiciary. Or again, learned and able men, at first chiefly ecclesiastics, were sent down by royal commission, or writ, to convene and preside at a county court. These men, having some notion of what a civilised system of procedure should be, would, of course, be shocked at the spectacle of a turbulent county court, and would revolt from the idea of such a noisy tumultuous assembly being deemed a court of justice. And their first object would be to improve it. The way in which to do so was simple

silence on this head, have passed, in my mind, a very hasty judgment on the extent of that great lawyer's learning.

The lawyers of this country, like the people, impatient of foreign innovations, soon moulded the institutions of Normandy into a new shape, and formed a system of feuds of their own. The usage and custom of the country became the guide of our courts; who have invariably rejected with disdain all arguments from the practice of other countries. [This view is in accordance with that of Hale, who, as will have been seen, denied that there had been any such sweeping alteration of the tenures of the land as some had supposed.]

For a knowledge of the feudal system, as far as concerns an English lawyer, we are to look no farther than Glanville, Bracton, and Littleton. And as far as it is to be collected from the works of these and other English lawyers, the *feudal system of England* respecting landed property is discussed in this and the subsequent parts of this History (as I should think) at as great length as could conveniently be done consistent with the plan of such a work.

The design of this History seemed to make it absolutely necessary to adhere to this plan. To investigate the first principles of our law, and to pursue them through all the modifications and applications, all the additions and changes to which they were subjected in different periods of time, is an inquiry that called upon the writer rather to reduce and simplify his materials, than to seek for new ones, or extend his views.

ture, are the separation of the ecclesiastical from the temporal court, and the establishment of the *curia regis*. By an ordinance of William the Conqueror, the bishop, with all ecclesiastical causes,

and easy enough, and was indeed already pointed out by rude beginnings in the Saxon laws, or the usages introduced, at all events in criminal cases, by Alfred—that is, the *swearing of a certain number of men as judges*: in short, the empanelling a jury to try the case under the direction of a skilled and learned judge. And, accordingly, early in the reign of the Conqueror this was attempted, and the experiment was tried with great success in what Lord Coke, Selden, and Lord Hale all cite as the “great case,” or “famous case” of the suit by the Archbishop of Canterbury against Odo, Bishop of Bayeux, to recover a number of manors in the county of Kent—a case tried at a county court on Penenden Heath, with the aid of a jury, that is, of twelve men out of the county, *sworn* to decide truly on their knowledge. Lord Coke sets out the whole record in the Preface to the 9th Part of his Reports, and Selden sets it out in his notes on *Eadmerus*. And although, as the *judgment* was that of the county court, it is so stated in the record, there is no doubt from contemporary history that twelve men were sworn, and that made it a trial by jury. Our author mentions the case in a subsequent portion of this chapter; but misses its main point, and fails to observe how it happened that a Bishop presided at the court—not the bishop of the county, but a foreign bishop, whose authority could only have been derived from royal commission. That this was not the only instance of the kind, is shown by Mr Foss, who cites another case (*Lives of the Judges*, vol. i. p. 26). There also the king sent a foreign prelate down as justiciary into the county, and he empanelled a jury (*Ibid.*). Sir James Mackintosh cites the former case, and says “it has much the appearance of the dawn of trial by jury” (*History of England*, vol. i. p. 275). And as, in each instance, the judge fined one jury for giving a wrong verdict, and empanelled another, that eminent historian truly observes that there was a new trial, which implies a power in the judge to instruct the jury on the law. And it is indeed stated in the record of the first case, that a bishop, as eminently skilled in the law, came by the king’s command to instruct the jury as to the customs of the realm, *i.e.*, the law. The substantial resemblance between this proceeding and a modern assize is manifest. It is difficult to see in what the two proceedings differed. For the county assizes, at this day, sit under commissions issued into the different counties, each commission is *for the county*; under it the sheriff convenes the gentlemen of the county as the grand jurors, and the farmers and traders, the representatives of the ancient freeholders, the suitors at the county court, as jurors. There is still the sheriff and the county court, there is the king’s judge and the jury; and the only difference between that proceeding, and the one which took place on Penenden Heath eight hundred years ago, is, that the jurors then gave their verdict of their own knowledge. At a later time, the *curia regis* gradually rose, taking cognizance first of cases between the crown and the subject, which arose in the exchequer, and then of cases between subject and subject, such as afterwards came into the common pleas. The notion that all this had any connexion with feudality is mere error. It was the progressive growth of law. The judges who sat in that high court often went into the counties to hold the courts there, and the justices, who had acquired experience in the counties, were called to that high court. The serjeants-at-law, then beginning to be known, sat with the sheriff or justiciary in the county courts; and the most learned and eminent men in the kingdom, laymen or ecclesiastics, were appointed to serve the crown as judges, either in the *curia regis*, or the courts of the counties. All this will be found described in the first vol. of the *Lives of the Judges*, by Mr Foss, and its effect upon the administration of justice must be too obvious to require to be pointed out. It is manifest that the decisions of these judges, either in the counties or in the *curia regis*, must have had a great effect in moulding procedure, and improving the law. And we have scattered through the *Mirror of Justice*, numerous judicial decisions and many “ordinances,” which no doubt were no more than judicial decisions, of a most important character, and gradually modifying and improving the law, until it reached, in the reign of Henry II., the form in which we have it presented to us in the learned treatises of Glanville and of Bracton. From the 18th Henry I., the records of the exchequer prove that king’s justices went into the counties on their circuits or itineraries; and there can be no doubt that from the time of the great case of the Archbishop of Canterbury, that course of proceeding was preserved. The result was that the county court in its old form lost its reputation, and the way was prepared for a prac-

was separated from the sheriff (*a*) ; and the ealderman, or earl, receiving a feudal character, began to hold his county court as the feudal lords did theirs (*b*). This was done by the *sheriff*, who, soon after the Conquest, if not before, grew to be a different person

tice which virtually destroyed it, except for comparatively small cases. That was the practice of requiring the suitor to take out a writ to the sheriff in any case above the value of forty shillings, which was the ancient limit, according to the *Mirror*, of the jurisdiction, not of the county courts, but of the courts baron (*vide ante*). Writs used to be sued to compel the sheriff to proceed, and now it was said they were required to enable him to proceed. The effect was, that the suitor, in all cases above the amount, had a writ out of the king's court, and had to pay a fee for it, no doubt as great as he would have to pay for a writ in the king's court. The *Mirror* makes this a great grievance ; money at that time being extremely scarce. The natural result was, that the suitors in the more important cases preferred to sue in the king's court ; added to which, the king's courts would remove the suits, if at all important. Hence the county court declined in credit. In the reign of Henry I., when it was endeavoured to improve it, the bishops and barons were desired to attend it (*Leges Henrici Primi*, c. ii.) ; but in that reign, and that of Henry II., the king's judges had long gone into the counties on their circuits, and as it was inconvenient always to make the sheriffs judges, or judges sheriffs, they convened the counties under special commissions at county courts, independent of the sittings held by the sheriff, and, of course, empanelled juries. (They were enabled to convene the men of the county by the laws of Henry I., and could easily direct juries to be empanelled.) Thus, in the reign of Henry III., the old county courts had so far declined that the bishops and barons were excused from attendance (*Mirror*, c. i.) ; and, on the other hand, the resemblance between the old county courts and the new courts held by king's judges was so great that the chief men of the county considered they were entitled to sit as if they formed a part of it. In the reign of Richard II. this was prohibited, and it was ordained that no lord, or other in the county, little or great, shall sit upon the bench with the justices, to take assizes in their sessions in the counties of England (20 *Richard II.*, c. iii). Thus, then, the assizes, held by the king's judges finally superseded the old county court, which, though in law retaining its jurisdiction, in practice virtually lost it. The change, it will be observed, took not less than three centuries of progressive innovation, and gradual alteration, to effect it ; and throughout the whole period there was no violent or sudden change, and the alteration was effected so silently and quietly that probably the people at that period hardly observed it. It is obvious that the effect of this improvement in the judicature and in the procedure for the administration of justice, must have had an equally powerful, though equally unobserved, effect in gradually moulding and modifying the law.

(*a*) This is not correct : it was not the bishop who was removed from the county court, it was the ecclesiastical causes which were removed from it to a separate court of the bishop ; the reason assigned being that it was not becoming that the laity should meddle in ecclesiastical matters. The edict was "Ne ullus vicecomes, aut prepositus seu minister regis, nec aliquis laicus homo, de legibus quæ ad episcopum pertinent, se intromittant, nec aliquis laicus homo alium hominem, sine iusticia episcopi ad iudicium adducat (*A.-S. L.*, v. i. 495). There was no idea of removing the bishop from the county court ; and, on the contrary, in the "*Leges Henrici Primi*" we find it carefully provided, "Interesse comitatui debent episcopi comities, et ceteræ potestates, quæ Dei leges et seculi negotia iusta consideratione diffiniant (c. xxxi., *A.-S. L.*, c. i. p. 534) ; and again, c. vii., "Intersint autem episcopes, comites, &c., deligenter intendentes, &c." (*Ibid.* 514).

(*b*) This is a still greater mistake. The ealderman was the hundredor, and the earl was the Roman "cones," or chief of a county—our lord-lieutenant. The sheriff was, as the Latin word indicates, the deputy of the earl or count—the viscount ; and he only convened and presided at the county court, at which the freeholders were the judges. There was no alteration in the constitution of the county court, and it could not possibly have any connexion with feudality, for it was simply a popular assembly. The lords always held their courts in their courts baron, quite independently of the courts of the hundred or county ; they were distinct jurisdictions, and therefore no alteration in their tenures, or in the tenures of those who would suit and serve in other courts, could have anything to do with the courts of the county.

from the *earl* (a). The periodical circuits henceforth ceased, and the county court and tourn were held in a certain place. In the former, the *vicecomes* or sheriff, Of judicature. acting for the earl, used to preside, and the freeholders, as before, were judges of the court. The latter, notwithstanding the absence of the bishop, soon afterwards received new splendour and importance from a law of Henry I. (b), which required all persons, as well peers as commoners, clergy as well as laity, to give attendance there, to hear a charge from the sheriff, and to take the oath of allegiance to the king. This obliged the greatest lords of the kingdom to submit to frequent remembrances of their subordinate station; and so contributed to draw closer the bands of political union. In other respects, these old Saxon courts seemed to continue in their original state. In the county court were held civil pleas; and in the tourn were made all criminal inquiries (c). Every manor had its court baron, where the lord was to hold plea and transact matters respecting certain rights and claims of his own tenants, and for the punishment of nuisances and misdemeanours arising within the manor; from all which courts, on failure of justice, there lay an appeal to the sheriff's court, and from thence to the king's supreme court. Many lords had franchises to hold hundred and other courts, both civil and criminal; and there are some few instances, where the crown had granted to a great lord *jura regalia* of a certain district; erecting it into a county palatine, distinct from, and exclusive of, all jurisdiction of the king's courts. William granted the county of Chester to *Hugh Lupus*; *hunc totum comitatum tenendum sibi et hæredibus ita liberè ad gladium, sicut ipse rex tenebat Angliam ad coronam*. The like ample grant was soon after made of the bishopric of Durham to that prelate;

(a) This always had been so. The earl was the count, and the sheriff the viscount.

(b) The author cites no authority, and there are only two sources whence laws of Henry I. can be derived: the "*Leges Henrici Primi*," printed in the *Anglo-Saxon Laws*, c. i., p. 510, and mentioned in the Introduction as a compilation made shortly after the death of that king; and the *Mirror of Justice*, which mentions many laws of the kings between the Conquest and the reign of Edward I. The former, the "*Leges Henrici Primi*," contains the following as to the county court:—"Intersint episcopi, comites, &c., deligentur intendentes," &c. (c. vii.); and again, "*Interesse comitatui debent episcopi, comites, et ceteræ potestates*," &c. (c. xxxi.). But in the *Mirror* it is stated that Henry III. excused the bishops, earls, barons, &c., from attendance at the county court (c. i. s. 16). It is to be observed that, under Henry I. and Henry II., the king's judges went into the counties twice a year to try cases, which superseded the county courts; and, in the reign of Richard II., it was enacted that no lord, great or little, should sit upon the bench with the king's judges.

(c) As already mentioned, the "leet" was the court of the hundred for criminal matters, and was restricted to common nuisances and the like (27 *Assize*; 22 *Edward IV.* 22, 4; *Ibid.* 4, 31). A particular private wrong could not be inquired of there as an assault (per *Martin J.*; 4 *Hen. VI.* 10). Trespass would not lie in a court-baron, at common law, where force was used (*Year-book*, 8; *Edw. IV.* 15); and the sheriff could not inquire in his tourn of any new matter made punishable by statute, but only of public nuisances (1 *Richard*, 3). The tourn or leet shall not inquire of matters given by statute, unless it is expressly said that they shall be inquired of at the tourn or leet (*Year-book*, 4; *Edw. IV.* 31), because their jurisdiction was by prescription, and it could only apply to things ancient.

and in later times grew up the franchise of Ely and Hexham, the counties palatine of Lancaster and of Pembroke.<sup>1</sup>

The supreme court of ordinary judicature established by William the Conqueror, was the *aula regis*, or *curia regis*; so called, because it was held in the king's palace, before himself, or his justices, of whom the *summus justitarius totius Angliæ* was chief. There was also the exchequer, called *curia regis ad scaccarium*;<sup>2</sup> which was held likewise in the king's palace, either before the king or his grand justiciary; and though in effect a member of the *curia regis*, was expressly distinguished from it. In what manner the grand justiciary, who presided in both these courts, ordered or distributed between them the several pleas instituted there, or in what manner these pleas were conducted, it is difficult at this distance of time precisely to determine. Respecting the nature of this obsolete judicature, little more can be hoped than such conjectures as may be founded on the few remaining monuments of antiquity.<sup>3</sup>

The *curia regis* consisted of the following persons: the king himself was properly head, and next to him was the grand justiciary, who, in his absence, was the supreme head of the court: the other members of this court were the great officers of the king's palace; such as the treasurer, chancellor, chamberlain, steward, marshal, constable, and the barons of the realm. To these were associated certain persons called *justitiæ*, or *justitiiarii*, to the number of five or six; on whom, with the grand justiciary, the burthen of judicature principally fell; the barons seldom appearing there, as little valuing a privilege attended with labour, and the discussion of questions ill-suited to their martial education (*a*). The justices

(*a*) The author cites no contemporary authority for all this; and there is great doubt as to the existence and constitution of any such court, unless it was the exchequer, which was not, originally, a court of ordinary jurisdiction. The *Mirror of Justice*, in the earliest and most ancient part of it, makes no mention of "*curia regis*" in that sense: and, on the contrary, states that it was ordained that freemen should judge their neighbours in the county courts and the courts of the hundred; and though it is said that plaintiffs could have remedial writs from the chancery, the form of such writs is given, and it is directed to the sheriff to compel him to decide the case; all which quite agrees with what appears even in the "*Leges Henrici Primi*," already largely quoted. There is no allusion to the exchequer any more than to the chancery, except as an office. The exchequer, it is said, was ordained that the barons might assess the amercements. Nothing is said in this, the earlier and more ancient chapter, of any king's court of justice, except the county court, which is called *curia regis* in the laws of Henry I., as we have seen. What is said in subsequent portions of the *Mirror* may refer to later times, after *Magna Charta*. In the laws of Henry I.—the only source of information on the subject, except the *Mirror* (which only mentions the exchequer, in any passage which can be referred to a period anterior to the Great Charter)—the phrase "*curia regis*" is only once used, and then evidently applies to the county courts. In a chapter (xxix.) headed, "*Qui debent esse judices regis*," it is said, "*regis judices sunt barones comitatus*;" and then it goes on to treat of the county court, and then the next chapter (xxx.) is headed, "*De libertate procerum in placito comitatum*;" and the next (c. xxxi.) directs that the barons should sit in the county court. "*Interesse comitatui debent comites, episcopi*," &c.; and then it is said, "*Recordationem curia regis nulli negare licet*," which

<sup>1</sup> *Vide* 4 Inst. 211.

<sup>2</sup> Wilk. Leg. Sax. 288.

<sup>3</sup> *Mad. Ex.* 57.

were the part of this court that was principally considered, as appears by the return of writs, which was *coram me vel justitiis meis* ; unless that appellation may be supposed to include every member thereof in his judicial capacity.

All kinds of pleas, civil and criminal, were cognizable in this high court ;<sup>1</sup> and not only pleas, but other legal business arising between parties was there transacted. Feoffments, releases, conventions, and concords of divers kinds were there made, especially in cases that required more than common solemnity.<sup>2</sup> Many pleas, from their great importance, were proper subjects of inquiry there ;

plainly means the county court, there being no other mentioned. It will be observed the author cites no authority to sustain his statements save Madox, whose work is dedicated to the exchequer. There is no reason to believe that there was before the Great Charter any proper king's court but the exchequer. In the chapter in the *Mirror of Justice*, headed, "Del Roy Alfred," in treating of the courts, the exchequer is mentioned as "*curia regis*," but only as an *office* ; and no other king's court is alluded to. "*Ordeine fuit l'exchequer en manner come ensuist perles peines pecunielles de comities et de baronnes en certaine, et aussi d' toutes comities et baronnes entirrs ou dismembers, et que ceux amerciements pussent afferred perles barons del exchequer, et que envoiat les estreates d' leur amerciements al exchequer ou que ils pussent amercies en le court le roy.*" The exchequer was ordained for pecuniary penalties of baronies and earldoms ; and the amercements were "afferred" (assessed) by the barons of the exchequer, though they might be amerced in the king's court—*i.e.*, in the county court, which, in the laws of Henry I., is so called. The *Mirror*, even in a passage not so ancient, says, "the exchequer is a place which was ordained only for the king's revenue ; where two knights, two clerks, and two learned men in the law are assigned to hear and determine wrongs done to the king and crown in right of his fees, and the penalties and accounts of bailiffs and receivers of the king's moneys, and the administrators of his goods, by the oversight of one chief who is the treasurer of England. The two knights, usually called two barons, were for to affer the amercements of earls and barons, the tenants of earldoms and baronies ; so that none be amerced but by his peers" (c. i. s. 14). Then afterwards, there is a passage more modern, "The barons of the exchequer have jurisdiction over receivers, and the king's bailiffs, and of alienations of lands and rights belonging to the king and to the rights of the crown. The court has a seal assigned to it and a keeper" (c. iv. s. 3). It is known that there was a royal seal before the Conquest, kept in the exchequer, and the writs of chancery were sealed there (*Madox, Exch.* i. 194). If there was any "*curia regis*" at the time, it was the exchequer, apart from the personal authority of the king. In a work of the time of Henry II., "*Dialogus de Scaccario*," the exchequer is said to have been erected at the time of the Conquest. Gervasius Tilburiensis says, "Nulli licet statuta scaccarii infringere, vel quamvis temeritate resistere ; habet hoc enim quiddam commune cum ipsa domini regis curia in qua ipse in propria persona jura dicit"—which shows, that even so late as the time of Henry II. the authority exercised by the king in *curia regis* was in *propria persona* ; and appears to imply that even then there was no regular judicature except in the exchequer. The roll of the exchequer commences in the reign of Henry I., and previous to that time there is no distinct evidence of a permanent office even of chief-justiciary, as the person appointed to such office appears to have often exercised indiscriminately the functions of chancellor and chief of the exchequer. So lately as the time of John, common suits came into the exchequer, before the king and his barons and justices then present (*Manning's Serviens ad Legem*, xix., and *Dugdale's Orig. Jurid.* 49, 50) ; and, on the other hand, there is no evidence of any king's court but the exchequer, until after Magna Charta, which said that common pleas should not be decided in a court which followed the king's person, as the exchequer did. The probability is that some ambiguity has arisen as to the sense in which the word "*curia*" was used, and that at first it meant the king's court, in the sense of his residence, where he sometimes in person sat, with the chief-justiciary and chancellor, attending to complaints of grievances, originally as to revenue ; hence arose a court of *justice*.

<sup>1</sup> *Mad. Ex.* 70.<sup>2</sup> *Ibid.* 77.

others were brought by special permission of the king and his justices.

The course of application to the *curia regis* was of this nature. The party suing paid, or undertook to pay, to the king a fine to have *justitiam et rectum* in his court: and thereupon he obtained a writ or precept, by means of which he commenced his suit; and the justices were authorised to hear and determine his claim. These writs were made out in the name and under the seal of the king, but with the *teste* of the grand justiciary; for the making and issuing of which (as well as for other offices) the king used to have near his person some great man, usually an ecclesiastic, who was called his *chancellor*, and had the keeping of his seal: under the chancellor were kept clerks for making these writs (a). It was probably this office of the chancellor that rendered him a necessary member of the *curia regis*; to which, in fact, and to the justices, and not to the king, suitors made their complaint, and, upon paying the usual fine, were referred to the chancellor to furnish them with a writ.

As the old establishment of the Saxons for determining common pleas in the county court was continued, very few of those causes were brought into the *curia regis* (b). While men could have

(a) The author, it will be observed, does not cite any authority for all this; and was not aware of the contents of the *Mirror of Justice*, a work already alluded to as founded on one of the age of Alfred, and containing the whole of our judicial procedure, as it existed from the time of the Conquest to the reign of Edward I., when it was completed. It is very observable that this ancient work makes no mention of any "*curia regis*," of which so much is said by the author, unless it be the exchequer. The chancery, however, is mentioned as *officina brevium*, and the exchequer as the court or office of *brevium*; and it may be observed that in the history of all countries it will be probably found that fiscal tribunals or functionaries are the most ancient institutions, and that other judicial institutions have often arisen out of them. Instead of the *curia regis* being divided into the exchequer and other courts, it rather appears that the exchequer was the original court, and that the others arose out of it. In the *Mirror* it is said, It was ordained that every one have a remedial writ from the king's chancery, according to his plaint: "*Ordeine fuit que chescun eyt de chancery l'roy brief remedial a sa plaint*" (i. 12). But the form of such writ given is directed to the sheriff to compel him to decide the case. So elsewhere it is said, "that jurisdiction was assigned by the king, by his commissions, or writs"—phrases used indiscriminately—"and without a writ he cannot give jurisdiction." But there were the itinerant justices, as appears elsewhere. "And so our ancestors appointed a seal and a chancellor to the same, to give remedial writs without delay." These writs, it is said, used to be written in English by a clerk of the chancery; and sometimes were directed to the lord of the fee; sometimes to the justices in eyre (the commissions); sometimes to the sheriffs, &c. (c. iv. s. 2). And the writs not returnable before the king are returnable in chancery (*Ib.* s. 3). But in the laws of Henry I. the county court is called the king's court, "*curia regis*;" and when, in these times, the king's justice is mentioned, it meant the itinerant justices. Thus it is said in the *Mirror*, that a cause concerning the freehold would be suspended until the coming of the king's justice into the county (c. ii. s. 28). The *curia regis*, if there was such a court, was the exchequer; which had not originally any ordinary jurisdiction, and the judges of which were called justices of the bench, to distinguish them from the itinerant justices. The common suits came at last into the exchequer, and then, when *Magna Charta* said they should not follow the king, as the exchequer did, the court of common pleas arose.

(b) It was a law of the Saxons, confirmed at the Conquest, that no man could go out of the county court unless on the ground that a failure of justice was inevitable.



justice administered so near their homes, there was no temptation to undergo the extraordinary expense and trouble of commencing actions before this high tribunal; but the partiality with which justice was administered in the courts of arbitrary and potent lords, often left the king's subjects without prospect of redress in the inferior jurisdictions: the king and the *curia regis* became then an asylum to the weak. It is not remarkable, that suitors coming to a court under such circumstances should consent to purchase the means of redress by paying a fine. Upon such terms was the *curia regis* open to all complainants: and the institution of suits was eagerly encouraged by the officers of that court.

The exchequer was a sort of *subaltern* court, resembling in its model that which was more properly called the *curia regis* (a). Here, likewise, the grand justiciary, barons, and great officers of the palace presided. The persons who were justices in the *curia regis*, acted in the same capacity here; this court being very little else than the *curia regis* sitting in another place, namely, *ad scaccarium*; only it happened, that the justices, when they sat at the exchequer, were more usually called *barons*. The administration of justice in those days was so commonly attendant on the rank and character of a baron that *baro* and *justitiarius* were often used synonymously.<sup>1</sup>

Affairs of the revenue were the principal objects of consideration

there. Thus, in the laws of William the Conqueror, "*Nemo querelam ad regem deferat nisi ei jus defecerit, in hundreti vel in comitatu*" (c. 43). This, which embodied the Saxon law, was embodied in the Laws of Henry I., and it is there expounded what causes led to a failure of justice, and drew causes into the king's cognizance (c. 33, *De placito tractando*). "*Defectus justitiarum, et violenti recti eorum destitutio, est qui causas protrahunt in jus regium.*" That is to say, there was then a ground of complaint to the king's extraordinary jurisdiction by reason of his prerogative; for under the head, "*De jure Regis*," is "*defectus justitiarum*" (c. x.). Therefore there was no ordinary jurisdiction between subject and subject, except in the county court; and no *curia regis* open to suitors; the remedy being, so far as appears, to send down a justice of the king to hear the trial. In the reign of Henry II., the chancellor had obtained some kind of judicial jurisdiction; for a contemporary states that he became a remembrancer in the chancery under the celebrated A'Becket, and, when he sat to hear and determine causes, was a reader of the bills and petitions (Fitz-Stephen's *Description of London* (pub. 1772), p. 19). But this may have been any of the "bills" or "petitions" for writs at common law, just as in the king's bench the ancient mode of exercising jurisdiction was upon "bill" of complaint; and the rolls of parliament, as late as the reign of Edward I., contained many instances of petitions in respect of matters which were redressed at common law.

(a) The reasons have already been given for holding that there was at this time no *curia regis* in the sense of a regular judicial tribunal, unless, indeed, it was the exchequer, in which, beyond all doubt, the king, and his barons, and justices gave redress in common suits as well as in matters of complaint as to the crown, as early as the reign of Henry II., and possibly earlier. Thus it is stated that the prior and monks of Abingdon appealed to Ranulph de Glanville in the reign of Henry II., respecting the king's seizure of their possessions, and that he was sitting in the exchequer (Dugdale's *Orig. Jurid.* 49). So cases are stated; as late as the reign of John, in which parties claimed redress for *private* wrongs in the exchequer (Manning's *Serviens ad Legem*, p. 171). In the *Abbreviatio Placitorum*, which contains the earliest records—except the Rolls themselves—many such cases will be found, and none *except* in the exchequer prior to Magna Charta.

<sup>1</sup> Mad. Ex. 134.



in the court of exchequer. The superintendence of this was the chief care of the justiciary and barons: the cognizance of a great number of matters followed as incident thereto; as the king's revenue was, in some way or other, concerned in the fees, lands, rights, and chattels of the subject; and ultimately in almost every thing he possessed.

However, it is thought the court of exchequer was not so confined to the peculiar business assigned it, and its incidents, as not to entertain such suits of a general nature as were usually brought in the *curia regis*<sup>1</sup>: and it is probable, this usage of holding common pleas at the exchequer continued till the time when common pleas were separated<sup>2</sup> from the *curia regis*; and that both courts ceased to hold plea of common suits at the same time, and by the same prohibition. Other legal business, like that in the *curia regis*, was also transacted at the exchequer: charters of feoffment, confirmation, and release, final concords, and other conventions, were executed there before the barons<sup>3</sup>; all which, added to the consideration that the constituent members were the same, put the court of exchequer very nearly on an equality with the *curia regis*.

By the multifarious and increasing business of these two courts, the grand justiciary and his assessors on the bench found themselves fully occupied; and as the application to these courts became more frequent, it was judged necessary, both in aid of themselves and in relief of suitors, to erect some other tribunal of the same nature. Accordingly justices were appointed to go *itinerant*, or circuits through the kingdom, and determine pleas in the several counties (a). To these new

(a) It will be obvious, from what has already been stated, that the reasons here assigned for the institution of the circuit court is quite wrong, and the inference from it erroneous. It has been seen that, as the ordinary justice of the realm was strictly local, the king's judges had to go into the counties to hold courts, and the metropolitan county formed no exception; if, indeed, there was any metropolis then, in our modern sense of the term, and not rather several chief cities or royal residences, where the court or council sat, following the person of the king; whence the necessity for the provision in Magna Charta that the common pleas should be fixed at Westminster. The constitution of the country, therefore, did not, for the ordinary justice of the realm, provide any courts other than those of the counties, and hence the necessity for remoulding them by sending down justices into the counties. This, then, was the original and most ancient form of a regular royal judicature, as far as regards the ordinary justice of the realm, civil or criminal; and there was no *curia regis* except the exchequer, the court for the extraordinary jurisdiction of the revenue, and perhaps a kind of royal council for matters partly political, partly judicial. It was not until some time after the itinerant justices had exercised their jurisdiction in the counties that the exchequer exercised jurisdiction in cases between subject and subject, and some time afterwards we find the court of common pleas. Thus, therefore, the order of events was exactly the contrary of what the author supposed, and it was not until the necessity had arisen for settling the issues in cases of importance, and a regular procedure was devised for the purpose, that the superior courts, as they are now called, began to rise in importance, and take cognizance of common causes, in order to determine matters of law. It was quite in accordance with the policy which had sent king's judges into the counties to empanell parties, and direct them

<sup>1</sup> Mad. Ex. 141.

<sup>2</sup> By the Great Charter.

<sup>3</sup> Mad. Ex. 145.

tribunals was given a very comprehensive jurisdiction. As they were a sort of emanations from the *curia regis* and exchequer, and were substituted in some measure in their place (except with the reservation of appeal thereto) they were endowed with all the authorities and powers of those courts. These *justices itinerant* or *errant*, in their several *itineras*, or *eyres*, held plea of all causes, whether civil or criminal, and in most respects discharged the office of both the superior courts. The characters of the persons entrusted with this jurisdiction were equal to the high authority they exercised; the same persons who were justices in the king's court being, amongst others, justices itinerant. They acted under the king's writ in nature of a commission; and they went generally from seven years to seven years; though their circuits sometimes returned at shorter intervals. Their circuits became a kind of limitation in criminal prosecutions, as no one could be indicted for anything done before the preceding *eyre*.

The administration of justice in the county and other inferior courts, notwithstanding some striking advantages, was certainly pregnant with great evils (*a*). The freeholders of the county, who were the judges, were seldom learned in the law; for although not only they, but bishops, barons, and other great men, were, by a law of Henry I., appointed to attend the county court (by which they might, after time and observation, qualify themselves to act in the office of magistrates), the study and knowledge of the laws was confined to a very few. Again, the determinations of so many independent judges, presiding in the several inferior courts dispersed about the country, bred great variety in the laws, which, in process of time, would have habituated different counties to different rules and customs, and the nation would have been governed by a variety of provincial laws. Besides these inherent defects, it was found that matters were there carried by party and passion. The freeholders, often previously acquainted with the subjects of con-

as to the law, to provide a judicature to settle the matters in dispute, to separate matters of law, and determine them before sending the case into the county for trial, when perhaps there was nothing to try, and the question resolved itself into one of law. Hence it is not until some time after the *itineras* (which commenced soon after the Conquest) had shown the necessity of this, that we find superior courts engaged in deciding matters of law in suits between subject and subject. It is not until the time of Glanville, who was chief justiciary under Henry II., and probably himself brought about the change, that we find a *curia regis* as a regular judicial tribunal.

(*a*) What follows, which is in substance taken from Lord Hale's history, is quite in accordance with what may be gathered from the language used in the Laws of Henry I. already quoted. "*Defectus justiciarum, et violenti recti eorum destitutio, est qui causas protrahunt in jus regium*" (c. 33). And elsewhere, "*Et si quisquam, violenta recti destitutione, in hundretis vel congruis agendorum locis causam suam ita turbaverit, ut ad comitatus audientiam pertrahatur, perdat eum, &c. Si uterque necessario desit, prepositus et sacerdos, et quatuor de melioribus villarum assint pro omnibus qui nominatim non erunt ad placitum submoniti. Idem in hundreto decrevimus observandum de causis singulis, justis examinationibus audiendis de domini vel prepositi et meliorum hominum presentia*" (c. 7). The object was to get causes submitted to a select body of the better sort of freeholders, sworn to decide the case; which was a *jury*. At the end of the chapter, the author cites an instance of this,—already mentioned.

troversy, or with the parties, became heated and interested in causes; which, added to the influence of great men, on whom they were too much dependent by tenure or service, rendered these courts extremely unfit for cool deliberation and impartial judgment. Nor were these difficulties remedied by the power of bringing writs of false judgment, and thereby removing a cause into the *curia regis*, though the penalty of amercement on the suitors of the county court, for errors in judgment, was sufficiently severe. If these objections lay against the king's courts in the county, much more did they against those of great lords; who made the awards of justice subservient to their own schemes of power and aggrandisement.

Besides these, there were reasons of a political nature which dictated an establishment of this kind: this was, to obviate the mischiefs arising to the just prerogatives of the crown from the many hereditary jurisdictions introduced under the Norman system. A judicial authority exercised by subjects in their own names, must considerably weaken the power of the prince; one of whose most valuable royalties, and that which most conciliates the confidence and good inclinations of his people is, the power of providing that justice should be duly administered to every individual. Though the appeal from the hundred to the court of the sheriff (an officer of the king) so far kept a check upon the jurisdiction of lords, yet it was still to be wished that the inconvenience of appeals should be precluded, and that justice should be administered in the first instance by judges deriving their commission from the king.<sup>1</sup> If these reasons induced the crown to promote such an institution as this; the state of things in the country was sufficient reason with the people to desire, with the most ardent wishes, the occasional visits of a regal jurisdiction, like that of the *eyre*.

It is not easy to determine the exact period when this establishment of *justices itinerant* was first made (*a*). It has long been the

(*a*) The rolls of the exchequer show that they went regularly as early as 18 Henry I., and there is every reason to believe they went earlier, and soon after the Conquest. Instances indeed occur under the Conqueror, in which prelates were sent down into the counties under the king's writ or commission to hear causes tried in the county courts. The celebrated case in Kent, mentioned by the author, is mentioned in Dugdale's *Orig. Jurid.*, 21; and the record is given at length by Lord Coke, and by Selden in his notes to *Eadmerus*. And, as already seen, the Laws of Henry I. make mention of summons by the king's justices to the men of the county to attend them in these sittings in the counties, "*Qui ad comitatem secundum legem submonitus, venire noluerit, culpa sit,*" &c. (*Leg. Hen. Pr.*, c. xxix.). So, under the head "*De summonitionibus,*"—"qui summonitionem regis suscepit, et dimiserit," &c. (c. xlii.). So "*De superessione comitatus,*"—"Qui secundum legem submonitus a justicia regis ad comitatum venire supersederit," &c. (liii.). That the form of commission as given in Bracton had been framed with reference to these laws will be manifest, "*Sciatis quod constituimus vos justiciarum, nostrum, una cum dilectis et fidelibus, &c., ad itinerandum per comitatum; ut de omnibus assisis et placitis, tam coronæ nostræ quam aliis, secundum quod in brevi de generali summonitione inde vobis directo plenius continetur.*" A general writ of summons was addressed to all the justices (*Dug. Orig. Jurid.*, 52).

<sup>1</sup> Litt. Hen. II. vol. v. 273.

common opinion, that they were first appointed in the council held at Nottingham, or, as some say, at Northampton, in the twenty-second year of Henry II., A.D. 1176, when the king, by the advice of the great council, divided the realm into six circuits, and sent out three justices in each to administer justice.

It is true, that the first mention of these justices, in our old historians, is under this year; but it has been proved from the authority of records in the exchequer,<sup>1</sup> that there had been justices itinerant, to hear and determine civil and criminal causes, in the eighteenth year of the reign of Henry I., and likewise justices in eyre for the pleas of the forest. It also appears by the same authority, that in the twelfth, and from thence to the seventeenth of King Henry II. A.D. 1171, justices of both kinds had been constantly sent into the several counties. It is thought,<sup>2</sup> that the first appointment of justices itinerant was made by Henry I., in imitation of a like institution in France, introduced by Louis le Gros; <sup>3</sup> that in the reign of King Stephen, continually agitated by intestine commotions, this new-adopted improvement was dropped; and was again revived by Henry II., who at length fixed it as a part of our legal constitution. It appears from the records above alluded to, that during great part of the reign of Henry II. pleas were held in the counties by the justices itinerant from year to year.

The *itinera*, or circuits appointed at the council of Northampton were six; on each of which went three justices. The counties assigned to each of these circuits were as follow: in one, the counties of *Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, Buckingham, Essex, Hertford*; in another, *Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton, Leicester*; in another, *Kent, Surrey, Southampton, Sussex, Berks, Oxford*; in another, *Hereford, Gloucester, Worcester, Salop*; in another, *Wilts, Dorset, Somerset, Devon, Cornwall*; in another, *York, Richmond, Lancaster, Copland, Westmoreland, Northumberland, Cumberland*.

About three years after this (A.D. 1179), some alteration was made in this arrangement of *itinera*; for, at a great council held at Windsor, the kingdom was parcelled out into four circuits only, in the following order: in the first were the counties of *Southampton, Wilts, Gloucester, Dorset, Somerset, Devon, Cornwall, Berks, Oxford*; in the second, *Cambridge, Huntingdon, Northampton, Leicester, Warwick, Worcester, Hereford, Stafford, Salop*; in the third, *Norfolk, Suffolk, Essex, Hertford, Middlesex* (the county of *Middlesex* not being included in the former division at all), *Kent, Surrey, Sussex, Buckingham, Bedford*; in the fourth, *Nottingham, Derby, York, Northumberland, Westmoreland, Cumberland, Lancaster*. As each of these *itinera* contained more counties than the former division, they had also more justices assigned: the first three had each five justices; and the last, which was much the

<sup>1</sup> Mad. Ex. 96.

<sup>2</sup> Litt. Hen. II. vol. iv. 271.

<sup>3</sup> But see Schmidt des Deutschen Geschichte, vol. i. 586, and the Missi appointed by Charles the Great, vol. ii. 121.

greatest circuit, had six.<sup>1</sup> There is no mention of any further alteration of the circuits during the period of which we are now treating.

The justices appointed in the year 1176, were directed (a) and

(a) The author hardly gives the meaning accurately, "Quid justiciæ faciant omnes justicias, et rectitudines spectantes ad Dominum Regis, et ad coronam suam per breve domini regis vel illorum qui in ejus loco erunt de feodo dimidii militis et infra; nisi tam grandis sit querela quod non possit deduci sine domino rege, vel talis quam justiciæ ei reponunt pro dubitatione sua, vel ad illos qui a loco ejus erunt," i.e., the chief justiciaries or justices of the *curia regis*, for it was held in the time of John that all pleas held before the king's justices were held before him and held before the chief justiciary (*Abbreviatio Placitorum*, in anno 2 Johan.) And there was a distinction between them and the itinerant justices. The justices itinerant could only hold pleas of lands by writ, and cases even under the value mentioned could be sent to the king's superior courts, "pro dubitatione," i.e., for their difficulty. It may be mentioned here that in the *Abbreviatio Placitorum*, and also scattered through Bracton and the *Mirror*, are many brief abstracts and reports of cases decided before these justices itinerant, whose judicial labours tended immensely to develop the law, and especially to improve procedure. Thus, in the *Mirror* (c. 4, s. 21), mention is made of the course taken by Martin de Pateshall, a very able justice itinerant of those days, whose writings as usual are also repeatedly reported in Bracton. These are the earliest law reports in our language.

It is to be observed that these circuits of the itinerant justices are not to be confounded with the circuits of the judges of the superior courts afterwards held; for these itinerant justices were, as will have been seen, of an inferior grade to the judges of the king's superior court; whereas, in later times, the judges themselves went circuit, as they still do now. The itinerant justices were a far more numerous body, but they formed a fine judicial school from whence the king's superior courts were constantly recruited; and, on the other hand, sometimes the judges of the superior courts may have gone the itineraries. These justices itinerant, who were sometimes the sheriffs, were a kind of intermediate grade or order between the sheriff and the superior courts. The sheriff himself was often made a king's justice by the king's writ, for the purpose of trying a particular case touching the freehold, or of greater amount than his ordinary jurisdiction; and then, as Bracton says, he acted as justice of the king. The itinerant justices marked the next step in the improvement of our judicature. And it is extremely interesting to observe by what slow and gradual steps the improvement was effected, which, it will be seen, was a necessary step in the improvement of the law. A study of their decisions, as stated by Bracton in his great *Treatise*, will illustrate this; and the very fact that this great lawyer should so have cited them, strongly shows the influence and effect they had in improving the law. He cites them throughout his work, and almost on every page one or more such citations occur. They are cited by the county, and the year of the king, with the name of the case, "Ut probatum in rotulo de termino Paschæ anno regis Henrici decimo sexto, in comitatu Oxoniæ de Fray Pinchard," &c. (fol. 367). He often cites the celebrated Martin de Pateshall, mentioned in the *Mirror*, and cites a case "de ultimo itinere, Martin de Pateshall, in comitatu suff." (f. 32). The circuits of the itinerant justices are set down in Hoveden, p. 337, and are quoted in Hale's *History of the Common Law*, p. 143. Bracton, in his book *De Corona*, treats largely of the authority of the justices itinerant, and sets forth the terms of their commission (lib. iii. c. 17, fol. 115), which extended to all pleas of the crown and all its franchises, &c. Upon reading the commission, it is suggested that the senior justice shall deliver a kind of charge to the men of the county (the grand jury), as Martin de Pateshall was used to do, "Si justitarius placuerit, quidam major eorum et discretior publicè coram omnibus proponat quæ sit causa adventus eorum, et quæ sit utilitas itinerationis et quæ commoditas si pax obsevetur et proponi solent verba ista per Martin de Pateshall. In primis, de pace domini regis et justitia ejus violata per murtheratores et robbatores, et burglatores," &c. (*Ibid.*) They were to try with juries, for it is said, "Etiam possunt juratores xii de alio itinere, argui de perjurio, ut in anno regis Hen. nono, de quodam Henrico Romband in comitatu Hertford (*Ibid.*, f. 117); and though flight afforded a presumption of guilt, yet evidence was heard (*Ibid.* fol. 128).

<sup>1</sup> Vide Leg. Ang. Sax. p. 332, 333.

empowered to do, in their *itineræ*, all things of right and justice which belonged to the king and his crown, whether commenced by the king's writ or that of his vicegerent, where the property in question was not more than half a knight's fee; unless the matter was of such importance that it could not be determined but before the king; or the justices themselves, on account of any difficulty therein, chose to refer it to the king, or, in his absence, to those who were acting for him. They were commanded to make inquisition concerning robbers, and other offenders, in the counties through which they went; they were to take care of the profits of the crown, in its landed estates and feudal rights of various sorts, as escheats, wardships, and the like; they were to inquire into castle-guards, and send the king information from what persons they were due, in what places, and to what amount; they were to see that the castles which the great council had advised the king to destroy were demolished, under pain of being themselves prosecuted in the king's court; they were to inquire what persons were gone out of the realm, that if they did not return by a certain day to take their trial in the king's court, they might be outlawed; they were to receive, within a certain limited term, from all who would stay in the kingdom, of every rank and condition (not even excepting those who held by tenures of villenage), oaths of fealty to the king, which if any man refused to make, they were to cause him to be apprehended as the king's enemy; and, moreover, they were to oblige all persons from whom homage was owing, and who had not yet done it, to do it to the king within a certain time, which the justices themselves were to fix.

The principal part of these injunctions was given in consequence of the late civil war; but some Constitutions made at Clarendon, relating both to civil and criminal justice, were renewed at this same council at Northampton; and the justices itinerant then appointed were sworn to observe and execute those regulations in every point (*a*). Amongst other provisions of this statute, the justices were to cause recognition to be made whether a man died seised of land concerning which any doubt had arisen; and they were likewise to make recognition *de novis disseisinis*.<sup>1</sup>

This was the whole authority given to the justices itinerant by the statute of Northampton; how the objects of their jurisdiction

(*a*) It is to be observed that it appears from the *Mirror*, and from some passages in the chronicles, that there had been an ancient usage, even before the Conquest, for the kings, at first in person, and afterwards by their justiciaries, to go once in seven years into the counties, to observe and enforce the course of justice, and these circuits were called "eyres," or "iters," for which the more frequent itineraries of justices were substituted. These justices, however, had other things to do beside administer justice. They had also to look after fines and amercements and forfeitures for the crown, and there is reason to believe that this, rather than a zeal for justice, caused them to be sent on these missions, where they became so intolerable in their exactions that the people petitioned that they should not be sent so often; but only, as the "justices in eyre" had been—once in seven years.

<sup>1</sup> Litt. Hen. II. vol. iv. 275, 406.

were multiplied will presently appear, when we come to mention those schedules, called *capitula itineris*, which used to be delivered to the justices for their direction. In executing the king's commission, the plan of this institution was improved still further, for, that justice might not always be delayed in criminal cases till the justices itinerant came into the country, commissions used to be occasionally issued, empowering the justices therein named to make a *delivery of the gaol* specified in the commission; that is, they were by due legal examination, to determine the fate of all the prisoners, ordering a discharge of such who were acquitted upon trial, and continuing in further custody, or otherwise directing punishments to be inflicted on those who should have been convicted of any crime. But when these commissions were first brought into use, it does not appear.

It was some time after the appointment of justices itinerant that a court made its appearance under the name of *The bench.* *bancum* or *bench*, as distinguished from the *curia regis* (a). This court, like that of the justices in eyre, was probably erected in aid of the *curia regis*; and it is observable, that the *curia regis* ceased to entertain common pleas in its ordinary course much about the same time when the *bancum*, or *bench*, is supposed to have been erected. It is not likely this alteration was made *uno ictu*, but by degrees. It had evidently been the usage to hold pleas in the *bank* before the charter of King John, as *justitiiarii nostri de banco* are therein mentioned; so that the clause declaring that *communia placita non sequantur curiam nostram, sed teneantur in certo loco*, can no otherwise be understood, than as contributing to settle and confirm what had been begun before. In truth, the existence of the *bench*, and of the *justitiiarii de banco*, appears from records in the reign of Richard I. At that period certain descriptions came in use which were not before known, and which plainly and clearly mark the existence of such a court; such as, *curia regis apud Westmonasterium*, *justitiiarii regis apud Westmonasterium*, or *de Westmonasterio*, *bancum*, and *justitiiarii de banco*; <sup>1</sup> from all which it may be collected, that common pleas were at this time moving off from the *curia regis*, and were

(a) It is conceived that this is erroneous, and that the phrase justices of the bench meant justices of the *curia regis* (i.e., as is believed, the exchequer), to distinguish them from the justices *itinerant*, who were an inferior grade or order, and were not, moreover, permanent judges, but were only appointed for particular *itineras* or circuits, and were not always the regular judges, nor indeed at first were any so. Hence naturally the regular judges of the king's supreme court were called justices of the *bench*. In the *Abbreviatio Placitorum in anno 2 Johannis*, is a case in which the Abbot of Leicester, being sued before the justices of the bench, pleaded a charter of exemption from suit, except before the king or his chief justiciary; and it was held that pleas heard before the justices of the *bench* were in law heard before the king. It was otherwise of justices *itinerant*, and it was to them the charter applied. Common pleas were then heard before the *curia regis*, i.e., the exchequer; numerous records attest this, anterior to the time of the Great Charter.

<sup>1</sup> Mad. Ex. 539, 540.



frequently determined in a certain place, whose style was meant to be described in those expressions.

It has been observed,<sup>1</sup> that after the erection of the bank, the style of the superior court began to alter; and the proceedings there were frequently said to be *coram rege*, or *coram domino rege*; and in subsequent times the court was styled *curia regis coram ipso rege*, or *coram nobis*, or *coram domino rege ubicunque fuerit*, &c., as at this day.<sup>2</sup> However, it was still called *aula regis*, *curia regis*, *curia nostra*, *curia magna*.

As the exchequer was a member of the *curia regis*, and a place for determining the same sort of common pleas as were usually brought in the *curia regis*, the separation of such pleas from that court did considerably affect the exchequer. The clause in King John's charter equally concerned both courts: *curiam nostram* meant the exchequer, as well as the court properly so called.

Thus have we seen this grand institution of the Normans dilating its influence over the whole kingdom, encroaching on the ancient local tribunals of the people, by drawing into its sphere all descriptions of causes and questions; till having exerted, as it were, its last effort, in sending forth the new establishments of justices itinerant and justices of the bench, it disappeared by degrees from the observation of men, and almost from the records of antiquity, having deposited in its retirement the three courts of common law now seen in Westminster Hall: the court *coram ipso rege*, since called *the king's bench*; the *bench*, now called *the common pleas*; and the modern court of *exchequer*.

The court of chancery probably acquired a separate existence much about the same time. The business of the chancellor was to make out writs that concerned pro-  
The chancery.  
 ceedings pending in the *curia regis* and the exchequer (a). He

(a) This was the original province of the chancellor, and the chancery was an office ages before it was a court, though the chancellor was a member of the "*curia regis*." The chancery was *officina brevium*, and in a chapter in the *Mirror of Justice*, headed "*Del Roy Alfred*," is so described: "*Ordeine fuist que chescun eyt del chancery l'Roy brief remedial a sa pleint, sans nul difficulty, et que chescun ust l'process de la jour de son plea sans le seale l'Judge ou de la partie.*" And then, after mentioning the exchequer as the "*Court le Roy*": "*Ordeine fuit que le court le Roy soit overt a tous plaintiffs per que ils ussent sans delay briefs remedials aussi lieu sur le Roy come sur autre del people d'chescun injury.*" And a specimen of such a writ is given: "*Ordeine fuit que chescun plaintiff ust brief remedial a son Viscount ou al Seignior del fee en cest forme. Questus est nobis quod D., &c., et ideo tibi (vices nostras in hac parte committentes) precipimus quod causam illam audias et legitimo fine decidas.*" Now the antiquity of this chapter of the *Mirror* is manifest: first, from the very form of this writ, which commands the sheriff himself to decide the cause, and does not mention any writ to bring the case into the king's court, as in later times was the course, but is obviously only designed to compel the sheriff to hear the case in the county court; so that it is obvious that, at that time, the "*curia regis*" did not itself, in the first instance, hear common pleas between party and party; the old Saxon system of local jurisdiction still continued. Next, the antiquity of the passage appears from its mentioning the exchequer as the only "*curia regis*" then known, so that the passage must have been written before the *Magna Charta*.

<sup>1</sup> Mad. Ex. 543.

<sup>2</sup> *Ibid.* 544.



used to seal and supervise the king's charters, and, whenever there arose a debate concerning the efficacy or policy of royal grants, it was to his judgment and discretion that a decision upon them was referred. He used to sit with the chief justiciary and other barons in the *curia regis* and at the exchequer, in matters of ordinary judicature and on questions of revenue: though it was to the latter court he seemed mostly allied in his judicial capacity.<sup>1</sup> Mr Madox, observing that the rolls of chancery begin in the reigns of Richard and John to be distinct from those of the exchequer (a method of arrangement not observed before),<sup>2</sup> is inclined to think that the chancellor began about that time to act separately from the exchequer. In this conjecture he strengthens himself by a corroborating fact, as he imagines. In the absence of King Richard out of the realm, William de Longchamp, chief justiciary and chancellor, was removed from the former office by the intrigues and management of John earl of Morton, the king's brother. After this, it is thought, he might discontinue his attendance at the exchequer; and the business of the chancery, which before used to be done there, might be transferred by him to another place, and put into a new method; in which it might be judged proper and convenient to continue it ever after, separate and independent.

If this conjecture may be admitted, concerning an establishment beyond the reach of historic evidence, the court of chancery was erected into a distinct court nearly at the same time when the other three received their present form and jurisdiction; which will go a great way towards justifying one part of the maxim of the common lawyers, that the four courts of Westminster Hall are all of equal antiquity; though it *refutes* the other part of it, that they have been the same as they now are from time immemorial.

The chancery was the *officina justitiæ*, the manufactory, if it may be so called, of justice, where original writs were framed and sealed, and whither suitors were obliged to resort to purchase them in order to commence actions, and so obtain legal redress. For this purpose the chancery was open all the year; writs issued from thence at all times, and the fountain of justice was always accessible to the king's subjects. The manner in which the business there was conducted, seems to have been this: the party complaining to the justices of the king's court for relief, used to be referred to the chancellor (in person, perhaps, originally), and related to him the nature of his injury, and prayed some method of redress. Upon this, the chancellor framed a writ applicable to the complainant's case, and conceived so, as to obtain him the specific redress he wanted. When this had been long the practice, such a

Bracton, writing after the charter, speaks of the sheriff as deciding, under a writ like the above, called a Justicies, causes he could not, *ex officio*, decide, which marks a great change, for it is manifest from the chapter in the *Mirror* that there was originally no other court but that of the county, for common suits, in the first instance.

<sup>1</sup> *Mad. Ex.* 131.

<sup>2</sup> *Ibid.* 132.

variety of forms had been devised, that there seldom arose a case in which it was required to exercise much judgment; the old forms were adhered to, and became precedents of established authority in the chancellor's office. After this, the making of writs grew to be a matter of course; and the business there increasing, it was at length confided to the chancellor's clerks, called *clerici cancellarie*, and since *curstores cancellarice*. A strict observance of the old forms had rendered them so sacred, that at length any alteration of them was esteemed an alteration of the law, and therefore could not be done but by the great council. It became not unusual in those times for a plaintiff, when no writ could be found in chancery that suited his case, to apply to parliament for a new one.

Thus far the chancellor seemed to act as a kind of officer of justice, ministering to the judicial authority of the king's courts. The chancellor's character continued the same, after this separation, as it had been before, without any present-increase or diminution. In the reign of Henry II. he was called the second person in the government, by whose advice and direction all things were ordered. He had the keeping of the king's seal; and, beside the sealing of writs, sealed all charters, treaties, and public instruments. He had the conduct of foreign affairs, and seems to have acted in that department which is now filled by the secretaries of state. He was chief of the king's chaplains, and presided over his chapel. His rank in the council was high; but the great justiciary had precedence of him.<sup>1</sup> He is said to have had the presentation to all the king's churches, and the visitation of all royal foundations, with the custody of the temporalities of bishops; but those writers who have taken upon them to speak fully of the office of chancellor, say nothing of any judicial authority exercised by him at this time. In the *curia regis* he was rather an officer than judge; but as he assisted there, so he was sometimes associated with the justices in eyre.<sup>2</sup> There is no notice, even in writers of a later date than this, neither in *Bracton* nor *Fleta*, that the chancellor, after he sat separate from the exchequer, exercised any judicial authority, or that the chancery was properly a court; but it is always spoken of as an *office* merely, bearing a certain relation to the administration of justice, in the making and sealing of writs.

Notwithstanding the hereditary lords absented themselves so entirely from the *curia regis*, they still retained an inherent right of judicature, which resided in them as constituent members of the council of the king and kingdom. When the *curia regis* was divided, and the departments of ordinary judicature were branched out in the manner we have just seen, the peculiar character of this council, now separated and retired within itself, became more distinguishable.

<sup>1</sup> Mad. Ex. 42, 43; Litt. Hen. II. vol. ii. 312.

<sup>2</sup> Mad. Ex. 42.

This council was of two kinds and capacities: in one, it was the national assembly, usually called *magnum concilium*, or *commune concilium regni* (a); in the other, it was simply the *council*, and consisted of certain persons selected from that body, together with the great officers of state, the justices, and others whom the king pleased to take into a participation of his secret measures, as persons by whose advice he thought he should be best assisted in affairs of importance. This last assembly of persons, as they were a branch of the other, and had the king at their head, were considered as retaining some of the powers exercised by the whole council. As they both retained the same appellation, and the king presided in both, there was no difference in the style of them as courts; they were each *coram rege in concilio*, or *coram ipso rege in concilio*, till the reign of Edward I., when the term *parliament* was first applied to the national council; and then the former was styled *coram rege in parlamento*.

The judicial authority of the barons, which still resided with them after the dissolution of the *curia regis*, was this: they were the court of last resort in all cases of error; they explained doubtful points of law, and interpreted their own acts; for which purpose the justices used commonly to refer to the great council matters of difficulty depending before them in the courts below. They heard causes commenced originally there, and made awards thereupon; and they tried criminal accusations brought against their own members.

The *council*, properly so called, seems to have had a more ordinary and more comprehensive jurisdiction than the *commune concilium*; which it was enabled to exercise more frequently, as it might be, and was continually summoned; while the other was called only on emergencies. In the court held *coram rege in concilio*, there seems to have resided a certain supreme administration of justice, in respect of all matters which were not cognizable in the courts below: this jurisdiction was both civil and criminal. They entertained inquiries concerning property for which the ordinary course of common-law proceeding had provided no redress, and used to decide *ex æquo et bono*, upon principles of equity and general law. All offences of a very exorbitant kind were proper objects of their criminal animadversion. If the persons who had taken part in any public disorder were of a rank or description not to be made amenable to the usual process, or the occasion called

(a) All that relates to the subject of *concilio regni*, or *concilio regis*, or *curia regis*, which in early times very likely meant very much the same thing, is involved in obscurity. The author, it will be observed, cites no contemporary authority, and it is believed that all that exists has already been cited in the notes, except, perhaps, a passage in Glanville, in which, speaking of the assize or trial of real actions, he says, "Est autem assisa regale, quoddam beneficium clementia principis, de concilio procerum populis indultum;" to which, perhaps, it may be added that several passages in the *Mirror* speak of ordinances of kings on the subject of the law, or the administration of justices, which no doubt meant ordinances made by the king, with the counsel of his chief officers of state, the principal barons, &c.

for something more exemplary than the animadversion which could be made by ordinary justices, these were reasons for bringing inquiries before the council: in these, and some other instances, as well touching its civil as criminal jurisdiction, it acted only in concurrence with, and in aid of, the courts below.

Thus was the administration of justice still kept, as it were, in the hands of the king, who, notwithstanding the dissolution of his great court, where he presided, was still, in construction of law, supposed to be present in all those which were derived out of it. The style of the great council was *coram rege in concilio*, as was that of his ordinary council for advice. The chancery, when it afterwards became a court, was *coram rege in cancellariâ*; and the principal new court which had sprung out of the *curia regis*, was *coram ipso rege*, and *coram rege ubicunque fuerit in Angliâ*.

The separation of ecclesiastical causes from civil, or the spiritual was not the least remarkable part of the revolution court. our laws underwent at the Conquest (a). The joint jurisdiction

(a) There is no subject upon which the author fell into greater error than this. It was a complete fallacy to suppose that the separation of ecclesiastical causes from civil first took place on the occasion of the decree here adverted to, which merely enforced it. The distinction between ecclesiastical and secular causes is drawn throughout the Saxon laws with great acuteness, as has been shown. Several of the kings were so careful to draw it, that they separated their ordinances ecclesiastical, made either in synods or councils, from their secular laws, made in the council. (See the laws of Edgar, Ethelred, Athelstane, and Canute, *Ang.-Sax. Laws*, vol. i.). And these again were distinguished from the canons and constitutions of the prelates, made of their own authority in ecclesiastical synods, which form quite a distinct collection (*Ang.-Sax. Laws*, v. ii.). And it was likewise distinctly recognised that the administration of the ecclesiastical law belonged to the bishops, though it might be enforced by the secular law. Thus Edward lays down in his ecclesiastical laws that men in holy orders who were immoral were worthy of what the canon had ordained—that is, to forfeit their possessions (*A.-S. L.*, v. i. p. 245). So, if any one committed homicide, he was not to come into the king's presence until he had done penance, as the bishop might teach (*Laws Ed. Ecc.*, 3; *Ibid.* p. 257); and then, in the secular laws, this is enforced further (*Ibid.* p. 249). So the laws of Ethelred speak of fines as secular correction for divine purposes (*Ibid.* p. 319). So the ecclesiastical laws of Canute lay down that men of every order submit each to the law which is becoming to him (*Ibid.* p. 315); and then the secular law says that if a man in holy orders commit a crime worthy of death, let him be seized and held to the bishop's doom (*Ibid.* 403). And so Alfred hanged a judge who judged a clerk to death over whom he had not cognizance (*Mirror*, c. v. 213-235). So the distinction was drawn clearly in the laws of the Confessor, collected by the Conqueror: "A sancta ecclesia, per quam rex et regnum solide subsistere haberent, pacem et libertatem concionati sunt dicentes (c. i.). "Et si aliquis excommunicatus ad emendacium, ad episcopum venerit, absolutus eundo et redeundo pacem, Dei et sanctæ ecclesiæ habeat. Et si pro justitia episcopi emendare noluerit, ostendat regi, ut rex constringat forisfactorem, ut emendet cui forisfecit, et episcopi et sibi" (c. ii.). "Quicumque de ecclesia tenuerit, vel in feudo ecclesiæ manserit, alicubi extra curiam ecclesiasticam non placitabit; si in aliquo forisfactum habuerit, donec, quod absit, in curia ecclesiastica de recto defecerit" (c. iv.). "Si quis sanctæ ecclesiæ pacem frugerit, episcoporum tum est justitia" (*Ibid.* p. 444). The distinction, then, was well established, and was not now first drawn, but only enforced; and enforced, not by taking the bishop from the county court, but by taking the ecclesiastical causes from that court, and remitting them to the court of the bishop. The edict, therefore, was in aid of episcopal jurisdiction, and merely enforced the existing law. It did not purport to be, nor was it, a new law; it was a charter declaratory of and enforcing the established law of the land, that spiritual matters were for the bishop. It recited that it was issued with the consent and

exercised in the Saxon times by the bishop and sheriff was dissolved, as has been before mentioned, by an ordinance of William ; and the bishop was thenceforth to hold his court separate from that of the sheriff.<sup>1</sup>

This ordinance of William is comprised in a charter relating to the bishopric of Lincoln ; and therein he commanded, " that no bishop or archdeacon should thenceforward hold plea *de legibus episcopalibus* in the hundred court, nor submit to the judgment of secular persons any cause which related to the cure of souls ; but that whoever was proceeded against for any cause or offence according to the episcopal law, should resort to some place which the bishop should appoint, and there answer to the charge, and do what was right<sup>2</sup> towards God and the bishop, not according to the law used in the hundred, but according to the canons and the episcopal law." In support of the bishop's jurisdiction, it was moreover ordained, " that should any one, after three notices, refuse to obey the process of that court, and make submission, he should be excommunicated ; and, if need were, the assistance of the king or the sheriff might be called in. The king, moreover, strictly charged and commanded, that no sheriff, *præpositus sive minister regis*, nor any layman whatsoever, should intromit in any matter of judicature that belonged to the bishop."<sup>3</sup> This is the whole of that famous charter.

When the spiritual court was once divided from the temporal, different principles and maxims began to prevail in that tribunal. The bishop thought it noways unsuitable, that subjects of a different nature from those concerning which the temporal courts decided, should be adjudged by different laws ; and, being now out of the influence and immediate superintendence of the temporal judges, he was very successful in introducing, applying, and gaining prescription for the favourite system of pontifical law, to which every churchman, from education and habit, had a strong partiality. The body of canon law soon exceeded the bounds which a concern for the government of the church would naturally affix to it. Instead of confining their regulations to sacred things, the canonists laid down rules for the ordering of all matters of a temporal nature, whether civil or criminal (*a*). The buying and

counsel of the prelates, and it concludes thus : " Hoc etiam interdico, ut aliquis laicus homo, de legibus quæ ad episcopum pertinent se intromittant, nec aliquis laicus homo alium hominem sine iusticia episcopi ad iudicium adducat " (*A.-S. L.*, v. i. p. 496). " The language of the charter," says Sir J. Mackintosh, " and probably its immediate effect, was favourable to clerical independence " (*Hist. Eng.*, v. i. p. 113). It is true that the acute historian—for once in error, and not aware of subsequent laws recognising and even enforcing the attendance of the prelates in the county courts—went on to observe that the effect was to withdraw them from the courts ; a manifest mistake. The bishops continued to sit in the court (*Leges Henrici Primi*, c. vii. 11).

(*a*) Only *in foro conscientie*, and as part of the great moral duty of justice ; in order to ascertain breaches of it, with a view to spiritual correction. In times when

<sup>1</sup> Wilk. Leg. Sax. 292 ; Seld. Tithes, 413.

<sup>2</sup> Wilk. Leg. Ang. Sax. pp. 292, 293.

<sup>3</sup> *Faciât rectum.*

selling of land, leasing, mortgaging, contracts, the descent of inheritance; the prosecution and punishment of murder, theft, receiving

there was really no law, this was very necessary; and the Roman ecclesiastics founded upon the Roman law a system of Christian jurisprudence of great use and value, which had, as already has been shown, had a great influence on the formation of our own law. Moreover, it should be observed that the law of England fully recognised the canon law for the purposes of spiritual correction, and, indeed, to a great extent enforced it. This has been already shown in the Saxon laws, being confirmed by the Conqueror, and it will have been seen that these laws repeatedly recognised the canon law and the right of the bishops to apply it in the exercise of their spiritual authority. So the law of the Conqueror, already alluded to, distinctly recognised this spiritual jurisdiction and canon law, for it directed—"ut nullus episcopus, de legibus episcopilibus, amplius in hundredo placita teneant, nec causam quæ ad regimen animarum pertinet, ad iudicium secularium hominem aduocant: sed quicumque secundum episcopales leges, de quacunque causa vel culpa, interpellatus fuerit, ad locum quem ad hoc episcopus elegerit veniat, ibique de causa vel culpa sua respondeat: et non secundum hundred, sed secundum canones et episcopales leges, rectum Deo et episcopo suo faciat." So that the very object of the separation of the ecclesiastical orders from the secular, was to enable the ecclesiastical court to administer a law different from the secular law; and having its own sentences and penalties; those, of course, consisting only of the deprivation of spiritual privileges, so far as the church was concerned; and hence it was that the same law went on to provide, that if a party set at nought the episcopal sentence, he might be excommunicated, and that then to vindicate this sentence the temporal power might be called in—"et si opus fuerit ad hoc vindicandum, fortitudo et iusticia regis vel vicecomitis adhibeatur." This, which was only in accordance with the Saxon laws, collected by the Conqueror, (see the *Laws of the Conqueror*, c. vi.), was going further than the canon laws, which only of themselves deal with spiritual privileges, and can only enforce the sentence by deprivation of those privileges. But as the temporal law upheld the ecclesiastical courts in the exercise of their jurisdiction, even where the law they administered was different from the secular law on the subject, it could be no ground of objection, as the author appears here to imply, that their law was different. It was necessarily so, because it was *in foro conscientia*: and every one knows that, quite apart from peculiar religious obligations, the measure of justice prescribed by conscience, is often larger than the measure prescribed by law. In so far as great offences against national law were concerned, as murder or robbery, there might be no difference between the spiritual law and the secular law, though as to the mode of trial there would be great difference; and men of any education, or acquaintance with the principles of intelligent procedure, could hardly do otherwise than revolt at the absurdity of the ordeal, or the brutality of the trial by battle. And, accordingly, in the *Mirror*, it is said—"that Christianity suffered not that men be by such wicked arts cleared, if one may otherwise avoid it," (c. iii. s. 23). And all through the Saxon laws it has been seen there was a gradual endeavour to get rid of the ordeal, by making it only the last resort, in failure of other modes of trial, and by the end of the reign of John it was obsolete. But it prevailed all through the reign of Henry II., and trial by battle prevailed much longer. And while the law was in this barbarous state, it is not to be wondered at that the ecclesiastics, while, on the one hand, it was their utmost endeavour to improve it, as to the laity, should, on the other hand, object to its application to the clergy. Hence, it has been seen, it was undoubted law under the Saxons that a "clerk" or ecclesiastic, was not liable to trial in the temporal courts; and thus it is recorded, in the *Mirror*, that Alfred hanged a judge who had caused execution to be done upon a "clerk," because he had no power over him. While as to the property of the church, it was equally clear that the secular courts had no jurisdiction. Thus, one of the laws of the Confessor was—"quicumque de ecclesia tenuerit, vel in feudo ecclesiæ manserit, alicubi extra curiam ecclesiasticam non placitabit, si in aliquo forisfactum habuerit, donec quod absit, in curia ecclesiastica de recto defecerit," (c. 4). In an age when the administration of justice was still so turbulent and barbarous, it was natural that the property and persons of ecclesiastics should be exempt from it. On the other hand, from a similar cause, some matters, even of a secular character, came under the cognizance of civil courts, as, for example, testaments. In an age when none but the ecclesiastics could read or write, it was a matter of necessity that testaments should be entrusted to their care, and it was natural that

of thieves, frauds ; these, and many other objects of temporal jurisdiction, are provided for by the canon law ; by which, and which alone, it was meant the clergy should be governed as a distinct people from the laity. This scheme of distinct government was, perhaps, not without some example in the practice of the primitive times ; when it was recommended that Christian men should accommodate differences among themselves, without bringing scandal on the Church by exposing their quarrels to the view of temporal judges. For this purpose, bishops had their *episcoporum ecclīci*, or church-lawyers ; and, in after times, their officials or chancellors ; and when the empire had become Christian, the like practice continued, for similar reasons, with regard to the clergy (a). But this, which was in its design nothing more than a sort of compact between the individuals of a fraternity, was exalted into a claim of distinct jurisdiction, exclusive of the temporal courts, for all persons who came under the title of clerks, and for many objects which were said to be of a spiritual nature (b). This attempt was

the cognate subject of intestacy should also be confided to them, on account of their being acquainted with the rules of descent, and capable of making a proper division of the property among all the next of kin ; a matter sometimes of much nicety. These two heads, however, of civil jurisdiction, the exclusive jurisdiction over ecclesiastics, and the special jurisdiction over testaments and intestacy, were obviously exceptional ; and arose out of the barbarism of the age. Abstracting these, what remained of the ecclesiastical jurisdiction was entirely *in foro conscientie*, and a matter of mere spiritual censure or correction. The sentences of the church could only be enforced by deprivation of spiritual privileges, and its highest punishment was excommunication, which was merely putting out of the communion and society of the church a person who set at nought its laws. The author observes truly, a little further on, that the canon law first known in the country was formed by permission and under authority of the government, and seemed to be supported by arguments of expediency. The existence of a church called for a set of regulations for the direction and order of its various functions. This was admitted, and under that notion a body of canonical law had been suffered to grow up for a long course of years.

(a) That the Roman law, and the Saxon law following it, went much further than this, has already been shown.

(b) That this was the law of England has already been shown from the Saxon laws, and can be shown from Bracton, who, writing in the reign of Henry III, having lived and died after the reign of Henry II., laid it down distinctly, that even in cases of murder the king's justices had no power to try clerks, for that they could not be touched in life or limb until degraded, and that the king's courts could not degrade them, and therefore they could not try those whom they could not punish, wherefore they were to be delivered to the bishop. "*Et ideo si petatur, erit liberandus curiæ Christianitatis—quia non habebit Rex de eo prisonam quem judicare non potest, nec clericos degradare, quia non potest eos ad ordines promoveri.*" (*De Corona*, lib. iii. c. ix., p. 124). And Bracton goes on to say that the punishment of degradation ought to suffice, as the man ought not to be punished twice for the same offence, the very point used by Archbishop A'Becket in the case which gave rise to the claim of civil jurisdiction. "*Cum autem clericus sic de crimine convictus degradetur—non sequitur alia pœna pro uno delicto, vel pluribus ante degradationem perpetratis. Satis enim sufficit ei pro pœna degradatio : quæ est magna capitis diminutio,*" though he goes on to say that if the bishop would not put him to his purgation in the matter, &c. Bracton mentions that in a case of apostasy which had happened in the time of "the good Archbishop (Becket), a priest who had apostatised and had been degraded, was burnt by the lay authorities. "*Statim fuit igne traditus per manum laicalem.*" This was according to the ancient law of the country, as shown by the *Mirror of Justice*, a striking illustration of the barbarism of the age. It was an age, however, in which, as also appears by the *Mirror*, men often burnt others to death, and, literally,



favoured by the separation now made, in this country, between the spiritual and temporal judges.

In the gradual increase of this clerical judicature, separate from the temporal courts, we see the means by which the ecclesiastics, in after times, were enabled to perfect their scheme of independent sovereignty, in the midst of secular dominion; whereby they assumed powers dangerous to the crown and the political freedom of the state.

The increase of the clergy in power and consequence was owing to the influence of the civil and canon law. With these instruments they ventured to encounter the established authority of the municipal law, whose dictates were so opposite to their grand schemes of ecclesiastical sovereignty.

Such an entire destruction had been made of every establishment by the Saxon invaders, that the Roman law <sup>Of the civil and</sup> was quite eradicated (a). The only remains of this <sup>canon law.</sup> law that could be picked up in the Saxon times, were from the

"put them into the fire," as the book says, "for hatred and revenge," (c. ii. p. 8), so that there was a distinct head of the criminal law about "*burners*,"—those who burn houses or *men* for hatred and revenge. "And if any one put a man into the fire," &c. In an age in which men burnt each other alive for revenge, they were not likely to scruple at doing it by way of punishment. The criminal code of the Saxons and Normans was dreadfully cruel; mutilation was ordained by Canute and the Conqueror, and enacted by Henry II. with peculiar cruelty, *men's feet being cut off*, and as apostates were burnt, poisoners were boiled. It seems scarcely credible, but is the fact, that the punishment of burning women for murdering their husbands was legal, down to the end of last century; so difficult is it to eradicate customs which have once got established in the institutions of a country. The criminal procedure of that age was, moreover, as odious and barbarous as the civil. The absurd ordeal was the resort of ignorance in quest of truth, and although, as Lord Hale says, "by means of the persuasions of the clergy, it died out in the reign of John, it was used all through the reign of Henry II. and his sons." It is necessary to understand this, in order to enter into the reasons which induced the Saxon kings to exempt clerics from their barbarous code and still more barbarous trial, and to secure them an ecclesiastical tribunal, which followed a more intelligent procedure and adopted more merciful punishments. It need hardly be added that the law as laid down by Bracton, did not apply to subsequent offences, committed after degradation.

(a) It has already been shown how utterly erroneous this notion is, arising from an entirely wrong idea of the nature and character of the Saxon invasion, or rather invasions; for they were numerous, local, and partial, and the Saxon conquest was so gradual, that it took centuries before it was completed, and was scarcely so, when the Danish invasion commenced; and during this long period there was ample time for an amalgamation of races, and an adoption of institutions. It has been seen that, so soon as the Saxons got settled in any part of the country, which was at first almost always in a rural district, they at once ceased to destroy what they wished rather to enjoy, and were soon content with making the former inhabitants their tributaries; and as the existing Roman institutions afforded the most convenient mode of so doing, they, of course, retained them. The Saxon conqueror seized the Roman manor, and made the owner his tributary, and all things went on as before. That the manorial system was adopted by the Saxons, has been shown from the Saxon laws as to the coloni, or tenants of the manor, and the manorial institutions pervaded the whole of the country. As to the municipal institutions of the cities, there is no trace of their being interfered with, while there is evidence that they were adopted. The conquest of the cities were, for reasons already glanced at and pointed out by Guizot, the latest of the conquests of the invaders; and they were by that time so far civilised, as to be capable of appreciating their institutions. We find, in the earliest of the Saxon laws, after the cities were subdued, a recogni-



code of Theodosius, and such scraps of Gaius, Paulus, and Ulpian, as still existed in some mutilated parts of the Pandects<sup>1</sup> (a). These remnants of the civil law, like other learning, were mostly in the hands of ecclesiastics, who studied them with diligence. It was from these that they formed a style, and learned a method, by which to frame their own constitutions; which were now growing to some magnitude and consequence, and began to claim notice as a separate system of law of themselves.

During the reigns of William the Conqueror and Rufus, we hear nothing in this country of the civil law<sup>2</sup> (b); though the in-

tion of their privileges (see the Laws of Athelstane, which make mention of most of the chief cities of the country south of London, and comprise a distinct enumeration of the customs of London—*Anglo-Sax. Laws*, v. i. p. 234); and we find afterwards, among the Saxons, those guilds or trade corporations which the Romans had established in the cities.

(a) The author very much underrates the extent and copiousness of the Code of Theodosius, and he entirely ignores the elements of tradition and custom as a means of transmitting the Roman law. There can be no doubt, as has been shown in the Introduction, that during the four centuries of the Roman occupation, a vast deal of Roman law had got into the customs, especially of cities; and much of it, too, was embodied in traditional ideas of law. "It is essential to observe," says our great historian, Sir J. Mackintosh, "that the Roman law never lost its authority in the countries which formed the western empire. All Europe obeyed a great part of the Roman law, which had been incorporated with their own usages, when these last were first reduced to writing after the Conquest. The Roman provincials retained it altogether as their hereditary rule. The only historical question regards, not the obligation of the Roman law, but the period of its being taught and studied as a science. It is not likely that such a study could have been entirely omitted in Roman cities, and where there were probably many who claimed the exercise of Roman law." (In a note, he mentions instances of English prelates who had studied the Roman law from the eighth century downwards. Thus, a Bishop of Salisbury studied the Roman law at York:—"Legem Romanorum jura medullitus remari, et jurisconsultorum secreta imis præcordiis scutari." Alcuin describes the same school, at York, in the ninth century). "But the Roman jurisprudence did not become a general branch of study till after the foundation of universities for systematic instruction in that and other parts of knowledge. It soon made its way into England, and was taught with applause by Vacarius, at Oxford, about the middle of the twelfth century, as we are told by his pupil, John of Salisbury" (*Mack. Hist. Eng.*, vol. i. p. 173). Hallam and Guizot give similar testimony (*Lect. Sur la Civiliz.*). At the time of the Conquest, as Mr Foss states, and for a long time afterwards, our chancellors and justiciaries were Roman ecclesiastics; finally, we find the whole civil and ecclesiastical organisation of the country under the Saxons as they existed during the Roman occupation—counties and hundreds, dioceses and parishes. Nothing, therefore, could be more utterly contrary to historic truth than the statement in the text; for, of course, law is best embodied in institutions; and if the institutions remain, the law they embody must also remain. But there is, as has been seen in the Saxon laws themselves, abundant evidence of the existence of some knowledge, obscure and imperfect though it may have been, of the Roman law, since some of the main principles of that law are to be found—no doubt, in scraps and fragments—in the fabric of those laws; while, in the first compilation of laws formed after the era of the Conquest—under one of the sons of the Conqueror, Henry I.—we find that, as Lord Hale says, "they taste of the civil and canon law," and whole passages are taken therefrom. The idea that the Roman law had perished or disappeared, is therefore entirely erroneous.

(b) On the contrary, the laws of the Conqueror repeatedly make mention of ecclesiastical courts and the canon law. Thus, the law already alluded to, enforcing the exclusive jurisdiction of the bishops over canonical offences:—"Nec causam quæ at regimen animarum pertinet, ad judicium secularium hominem adducant; sed

<sup>1</sup> Duck de aut. 299.

<sup>2</sup> *Ibid.* 307.

stitute, the code, and the novels of Justinian, had been taught in the school of *Irnerius*, at Bologna, and there were even some imperfect copies of the Pandects in France; yet the study of the civil law did not go on with spirit; nor was that system of jurisprudence regarded with the universal reverence which it acquired afterwards, when a complete copy of the Pandects was found at Amalfi, A.D. 1137, at the time that city was taken by the Pisans<sup>1</sup> (a).

The canon law first known in this country was formed by permission and under authority of the government, and seemed to be supported by arguments of expediency. The existence of a church, with the gradation and subordination of governors and governed, called for a set of regulations for the direction and order of its various functions. This was admitted; and under that notion a body of canonical jurisprudence had been suffered to grow up for a long course of years. In a national synod held A.D. 670, the *codex canonum vetus ecclesie Romanæ* was received by the clergy.<sup>2</sup> It appears also by the before-mentioned charter to the bishop of Lincoln, that<sup>3</sup> William the Conqueror, with the advice and assent of his great council, had reviewed and reformed the episcopal laws that were in use till his time in England. It is beyond dispute that a canon law of some kind had been long established here by the sanction of the legislature; as may be seen in Mr Lambard's Collection of Saxon Constitutions<sup>4</sup> (b). These ancient canons, were

quicumque, secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit: secundum *canones et episcopales leges*, rectum Deo et episcopo suo faciat" (*Anglo-Sax. Law*, vol. i. p. 495).

(a) This is the absurd idea, borrowed from Blackstone, that the study of the Roman law, all of a sudden began on the occasion of the discovery of a particular book; as if the book would have any interest, if the subject had not *already* been studied and appreciated. The object of diffusing this idea was obviously to excite a prejudice against the Roman law, by creating a notion of its novelty, and obscuring the fact that the law of England was founded upon it. The great object of the commentator was to enhance and aggrandise the credit of the common law, as of English growth, in order to vindicate the foundation of a professorship of it, as distinct from the Roman law; and hence he entirely ignores the Roman origin of our law, and endeavours to represent the introduction of the Roman law as comparatively modern and novel. But the idea is derided by later and more honest writers. Thus Sir J. Mackintosh says, "It was indeed a most improbable supposition that a manuscript found at the sack of Amalfi, not adopted by public authority, should suddenly prevail over all other laws in the greater part of Europe" (*History of England*, v. i., p. 173). So the great historian of Europe says, "The revival of the study of jurisprudence, as derived from the laws of Justinian, has generally been ascribed to the discovery of a copy of the Pandects. The fact, though not improbable, seems not to rest upon sufficient evidence; but its truth is the less material, as it appears to be unequivocally proved, that the study of Justinian's system had recommenced before that era. Early in the twelfth century, a professor opened a school of civil law at Bologna, where he commented, if not on the Pandects, yet on the other books—the Institutes and the Code—which were sufficient to teach the principles and inspire the love of that comprehensive jurisprudence. The study of the law having thus revived, made surprising progress" (*Middle Ages*, c. 8.) And he says, "that the body of the law was absolutely unknown in the west during any period, seems to have been too hastily supposed" (*ibid.*), for which he cites Selden, ad Fletam.

(b) It is here obviously necessary to take some notice of these canons and canonical

<sup>1</sup> Giann. Hist. Nap. lib. 11, ca. 2, vol. ii. p. 119.

<sup>2</sup> Wilk. Leg. Ang. Sax. p. 292.

<sup>3</sup> Seld. Notes to Eadm.

<sup>4</sup> Duck de aut. 98.

probably not so prejudicial to the rights of the sovereign and the constitutions, because the author gives no account of them, and goes on to argue on an assumption or supposition of their character. An analysis has already been given of the laws of the Saxons, ecclesiastical and secular, upon subjects connected with religion. Of these the learned editor of the *Anglo-Saxon Laws and Institutes* observes, "All ordinances proceeding from the king and wittenagemote, whether of a secular or ecclesiastical character, are considered as laws, and inserted in their places in the first part of the work. Those without such sanction, and of a nature strictly ecclesiastical, are placed among the *Monumenta Ecclesiastica*, vol 1, pref. xiv., and these are in the second volume of that valuable work. It will be observed that the former—the laws—were enforced by temporal penalties, and the latter, as our author observes, were framed with the sanction of the government; and, although not directly enforced by the secular power, were so indirectly, in this way that excommunication was recognised, and men were coerced into observance of ecclesiastical censures. The principal of these *Monumenta Ecclesiastica* are the penitentials of Theodore, Archbishop of Canterbury, at the close of the seventh century, and Egbert, archbishop, towards the close of the eighth century; together with a body of canons, enacted under Edgar, in the tenth century. The first thing that occurs to the reader is the indirect but effective sanction the recognition these canons must have given to the sanctity of confession. For, among the first things mentioned in the earliest of these documents is the imposition of ecclesiastical penance for murder and other capital crimes, which, of course, implies that there had been confession of the crimes, and also (as murder was capitally punishable by the secular law) the concealment of the confession, "Pro capitalibus criminibus, *i.e.*, sacrilegiis, homicidiis, et hissimilibus, sancti patres nostri spatium penitentiae, secundum mensuram et secundum ordinem cujusquæ, constituerunt" (*Pæn. Theod.*, c. 2); and all through these canons are to be seen impositions of penance for crimes, by the secular law punishable with death. It is true that by the early Saxon laws pecuniary compensation was allowed in cases of homicide (though it is by no means clear that this applied to deliberate murder, and not to cases of manslaughter), but even then the recognition of the ecclesiastical law was not less decided in another way. For in the laws of Edward—secular and ecclesiastical—it is provided that in any case of homicide the party should not come into the king's presence until he had done penance as the bishop had directed (*A.-S. L.*, v. i., pp. 247-249). It has been seen, too, that habitual thieves were punishable with death from the earliest times among the Saxons, and were so at the time of this penitential. In the laws of Canute it is mentioned that mere manslaughter might make compensation, but that murderers were to be given up to the kinsmen of the deceased; and it is to be observed, also, that even where compensation was allowed, if the guilty party could not pay it, he was liable to be punished capitally in cases of homicide, and so in cases of theft, which were capital. Yet all through the penitentials, crimes punishable with death are treated of as subjects of canonical penance for a long course of years, plainly implying secrecy; and these canons were, as the author observes, established with the sanction of the state. Thus, in the penitential of Theodore, "Synodus Romanæ decrevit parricidium faciens xiii. annis pœnitere, et semper religioso vivere" (*Pæn. Theod.* c. 3). So, in the later canons enacted under Edgar, "We enjoin that every priest shrive and prescribe penance to those who confess to him" (c. 65; *A.-S. L.*, v. 2, p. 259.) And then in the *Modus Imponendi Pœnitentiam*, "Quod episcopus sit in sede episcopali sui . . . tunc unusquisque eorum hominum que capitalibus criminibus polluti sunt, in provincia ista eo die ad illum accedere debet, et peccata sua illi profiteri, et ille tum præscribit eis pœnentiam, cuique pro ratione delicti sui, eos qui eo digni sunt ab ecclesiastica communitate segregat. Laicus qui alium sine culpa occiderit, vii. annos jejundet" (*Ib.*, p. 267). "Si quis servum suum, sine culpa, occiderit, pro furore suo, iii. annos jejundet" (*Ib.*, p. 269). In both these cases, the homicide is supposed to have been without fault in the slain person, and thus to be wilful murder; and yet not a word is said as to the obligation of the priest to disclose the crime, and it is, on the contrary, clearly implied that he is to conceal it, or how could the criminal do penance for a long course of years? So again in these canons, penned, he it observed, as our author remarks, with the sanction of the state, there is the most distinct recognition of the right of the church to enforce its own laws, although different from the law of the state. This is plainly expressed in the passage above cited, in which it is said that the bishop is to excommunicate in such cases as he thinks fit, and, among the cases specified in the canons as fit for excom-

state; for which reason, as well as on account of the appearance

munication, are some which would be no offence against the secular law, "Si mulier aliqua viro desponsata sit, non est permissum ut aliquis alius vir illam ei auferat; si fecerit hoc quis, excommunicetur" (*Ib.*, p. 271). Numerous other instances could be adduced, but one is as good as a hundred to establish a principle; and it is manifest, not only from the canons framed with the sanction of the state, but from the secular or ecclesiastical laws established by the state, that there was a recognition of the right of the bishops to enforce, by their spiritual powers, the laws of the church, even when different from that of the state. There were, of course, no cases in which they were expressly opposed, because, by reason of the union of the church and state, the bishops sitting in the national council, the secular laws were framed in unison with those of the church, but this only made the law stronger. And it is to be observed that, though there may have been no laws opposed to those of the church, there were many cases of difference between the laws; and thus, in a certain sense, they were opposed, as in the instance above mentioned, and many others, over which the secular law virtually allowed an act, and the spiritual law forbade it. And, as already observed, the church framing her laws *in foro conscientie*, and the measure of justice by the law of conscience being often much larger than that of law, there were innumerable cases in which the law of the church and of the land were different, and in a sense opposed. Nevertheless, the right of the church to enforce her own laws by her own censures, was recognised, even where the state declined to enforce them. And further, in these canons, as in the secular laws, the exclusive jurisdiction of the ecclesiastical courts over clerical persons and property, was distinctly recognised. Thus in the canons of Edgar, "Si quis ordinatum hominem occiderit, discedat à patria sua, et ita faciat, ut papa ei indicaverit et usque poeniteat" (*A.-S. L.*, c. ii. p. 273). Now, here, the canons being framed with the sanction of the state, is an implied yet distinct recognition not only of episcopal, but of papal jurisdiction, under the sacrament of penance, in a case of homicide on an ecclesiastic. And in the laws of Ethelred and Canute, this canon of Edgar is actually enacted into law. So in the case of homicide *by* an ecclesiastic. In the laws of Ethelred it is enacted, "If a servant of the altar be a homicide, or work enormous iniquity, let him forfeit degree and country, and go into exile as far as the pope shall prescribe to him, and do penance." "And if he will clear himself, (*i. e.*, if he elects to be tried by the temporal law), let him clear himself with the ordeal; and unless he begin amendment within thirty days, let him be an outlaw" (*Laws of Ethelred*, c. 26; *A.-S. L.*, vi. 347; *Laws of Canute*, c. 41, p. 401). Now, here it will be observed, that, first the canon of Edgar is enacted into law as regards the spiritual jurisdiction (no doubt for the purpose of enforcing it, for, of course, the bishop could not enforce a sentence of exile), and then it is provided that if the priest desires to have a trial by the secular law, he may do so; only, if he does not either obey the bishop or stand a trial, he is to be outlawed. That this is the meaning is clear from what follows: "If a man in holy orders defile himself with a crime worthy of death, let him be seized, and *held to the bishop's doom*" (*Ib.* p. 403). The power of the church to enforce her own laws by her own censures is abundantly recognised in various passages both of the ecclesiastical and secular laws, which draw a clear distinction between this and the power of the state to enforce the laws of the church by secular penalties. Thus, in the Civil and Ecclesiastical Institutes (*A.-S. L.*, v. ii. p. 319), the distinction is drawn clearly. "It is incumbent on bishops patiently to endure what they themselves cannot amend until it shall have been announced to the king, and let him then get amends for the offence against God which the bishop cannot, if he will rightly execute God's law." That is to say, it is optional in the state to do this or not; and if it does not do so, then the church can only enforce her laws by spiritual censures and the deprivation of religious privileges and communion, or by excommunication. So in the laws of Ethelred the distinction is drawn most clearly when it is said, that if for a spiritual offence a pecuniary penalty shall arise, as wise secular law may have established, it belongs lawfully to the direction of the bishops, as a *secular correction for spiritual purposes* (*A.-S. L.*, v. i. p. 329). And the excommunication was enforced by exclusion from the presence of royalty (*Ib.* 313). And wise were those secular witan who first added secular laws to the divine (*Ib.* 335), that thus men might be compelled to do right (p. 349). It is added, that when, after Edgar, what before was in common in secular government was separated, the laws were impaired (*Ib.*). In the laws of Canute, the union of secular and spiritual law is found restored, and the secular

they bore of municipal regulations, made at home for the govern- laws enforce clerical sentences, and punish such offences, as in cases of adultery and incest (*Ib.*, p. 405). But the exclusive jurisdiction of the bishop to enforce the law of the church by spiritual censures is all along upheld; and the distinction is clearly drawn in the laws of the Confessor, collected by the Conqueror, "Et si aliquis excommunicatus ad emendacionem ad episcopum venerit, absolutus pacem habeat. Quod si aliquis ei forisfecerit, episcopus faciat suam justitiam. Et si pro justitia episcopi emendare noluerit, ostendat regi, et rex constringat forisfactorem ut emendet cui forisfecit, et episcopo, et sibi" (*Ib.* p. 443). The language of this law, it will be seen, is, on the one hand, almost the same as that of the Civil and Ecclesiastical Institutes above extracted, and, on the other hand, it quite corresponds with the law of the Conqueror, also above quoted, and which recognises that, in matters pertaining to the correction of souls, no secular judge should intermeddle, and that when any one was, according to episcopal laws, accused of a fault or offence, it should be determined by the bishop according to the canons; "quicumque secundum episcopales leges de quacunque causa vel culpa interpellatus fuerit, *secundum canones* et episcopales leges, recti Dei et episcopi suo faciat" (*A.-S. L.*, v. i. p. 465). So in the *Leges Henrici Primi*, which are the most authentic contemporary exposition of what the law was supposed to be, there is a chapter headed "De Placitis Ecclesia pertinentibus ad Regem," and these relate to matters partly temporal, or to cases of secular correction of spiritual offences. "Sunt alia quedam placita Christianitatis in quibus rex partem habet hoc modo." This of itself implies that, as a rule, matters ecclesiastical or spiritual are not for the crown. "Si rex paciatur ut qui in ecclesia fecerit homicidium, ad emendacionem veniat, primo episcopo et regi precium reddat; et ita se inlegiat; deinde componat de pace ecclesiæ, et reconciliationem ecclesiæ quærat" (*A.-S. L.*, v. i. p. 521). Then there are penalties for non-payment of tithes, church-scot, and Peter's Pence, or "Rome-fee," as it was called (*Ib.*). Then certain offences, as adultery and perjury, are dealt with as common to episcopal and regal jurisdiction. Then there is an enactment taken from the Saxon laws; that if any one guilty of a crime worthy of death desires confession, it is not to be denied to him; and as the law of the church, it was notorious, regarded confession as sacred, this was an implied recognition of the sanctity of confession: "Si quis mortis reus confessionem desideret, nunquam negatur ei" (*Ib.* p. 521). Then there is a distinct recognition of the independent power of the church to declare and enforce her own laws by her own censures, and the duty of the state to enforce them by its secular powers: "Ubicunque recusabitur lex Dei juste servari, *secundum dictionem episcopi*, cogi oportebit per mundanam potestatem" (*Ib.* p. 522). The two kinds of power, it will be observed, are clearly distinguished, and the power of secular punishment, for spiritual offences, is put as the province of the state: "In causis emendalibus permissum est, ut terreni domini audeant, pecuniam emendacionem capere, *secundum legem terræ*" (*Ib.* p. 522). Thus, then, the law was recognised to be at the end of the reign of Henry I., embodying what had been the law all through the Saxon age, viz., that the bishops had the sole jurisdiction in matters ecclesiastical (which were held to include not only spiritual offences by laymen, but all offences of ecclesiastics, and all matters relating to ecclesiastical property), and that they had an independent power to enforce the canons and laws of the church by the censures of the church, leaving to the state to enforce them or not, as the state might think proper; the province of the state, however, being entirely limited to that. It would be impossible to find in the canon law any more extreme views upon the subject of the power of the Roman church, and the subordination of royal power to her—in a country which acknowledges the Roman church—than are to be found in the Saxon laws. Thus, in the last collection of them, the collection of the laws of the Confessor, made under the auspices of the Conqueror himself, and therefore undoubtedly authentic, "Rex autem, qui vicarius Summi Regis est, ad hoc est constitutus, ut regnum terrenum, et populum Domini, et super omnia, sanctam veneretur ecclesiam, et regat, et ab injuriis defendat, et maleficos ab ea evellat, et destruat, et penitus disperdat. Quod nisi fecerit, nec nomen regis in eo constabit, verum testante Papa Joanne, nomen regis perdit" (*Leges Edwardi Regis*, art. 17 apud *Wilkins*, i. 312). This went further than the Decretum of Gratian, founded on the decree of Pope John VIII., which only said that a king who refused to fulfil his duty to the church might be excommunicated: but it only applied to princes, upon whom such conditions were imposed by the law and constitution of the land. Then, as to the immunities of the clergy: "Cum clerico qui uxorem habeat,

ment of the church, they had never excited any complaint or jealousy.

et firmam teneat laicorum, et rebus extrinsecis seculariter deditus sit, seculariter est disceptandum. De illis qui ad sacros ordines pertinent, et eis qui sacris ordinibus promoti sunt, coram prelatiis suis est agendum, de omnibus inculpationibus, maximis vel minoribus" (*Leg. Hen. Pr. c. lvii. s. 91*). But in the *Mirror of Justice* it is laid down that it is a good exception to lay jurisdiction, that the judge has no power of the person of a clerk, by reason of the privileges of the church (c. xxxi. 1). "In the privilege of clergy, as if a clerk be ordered in court before a lay judge to answer to an action for a personal trespass, and especially in a case criminal and mortal, plead that he is a clerk, the judge hath no further cognizance of the case; for the church is so enfranchised that no lay judge can have jurisdiction over a clerk" (*Ibid.*, s. 4). It is indeed added that it rebutted the privilege to show that the clerk was bigamous, or a murderer, or a perjurer, or in such a condition that the church ought not to protect him against the king's peace; but this was evidently added after the controversy with Archbishop A'Becket: for of course it would render the privilege nugatory.

In the canons of the Archbishop Egbert, compiled from all the canons then extant, were these: "Ut sine auctoritate vel consensu episcoporum, presbyteri, in quibuslibet ecclesiis, nec constituantur nec expellantur" (c. 21; *Ang.-Sax. Law*, v. ii. p. 100). "Si quis episcopus aut presbyter, per pecunias hanc obtinuerit dignitatem, deiciatur, et ipse et ordinator ejus" (*Ibid.*, c. 43, p. 104). "Si in qualibet provincia ortæ fuerint quæstiones, ad majorem sedem, vel synodum, seu etiam ad apostolicam sedem Romæ, referantur" (*Ibid.*, c. 49, p. 104). "Tempore Constantini Augusti, congregavit Silvester papa synodum Romæ cum episcopis, quorum consensu et subscriptione constitutum est, ut nullus laicus clerico crimen audeat inferre. Testimonium ergo laici adversus clericum non recipiatur" (*Ibid.*, c. 144, p. 121). This, it will be observed, is founded upon the Roman canon; which is taken as beyond a doubt, that no cleric could be accused by a layman; *à multo fortiori*, he could not be tried by a laic. It would be difficult to find anything in the later canons which went beyond these. In the Penitential of Archbishop Egbert, it is laid down, as to offences of the clergy, "Si presbyter vitiatuſ esset capitalibus criminibus, postquam ordinatus sit, non ei licebit ministerium ullum ad altare Dei facere, sed maneat alioquin cum clericis, et si resipiscere velit, emendet prout episcopus ei præscripserit" (*Pen. Egð., Ang.-Sax. Laws*, v. ii. p. 197). "Si presbyter vel diaconus hominem occiderit, vel perjuraverit, perdat ordinem suum; et si ad emendationem se convertere velint emendant juxta sententiam episcopi" (*Ibid.*, c. 3). So that if a priest committed murder or perjury, he was degraded, and perhaps, in strict law, he would be liable to be tried for the murder, having lost his clerical privilege, a consideration which may have a bearing on the subsequent controversy between Henry II. and Becket. At the same time, it is plainly implied as the intention of the canons, that for the first offence degradation was to be the punishment. For an offence after degradation of course, the man would be liable to the criminal law.

The two points upon which it is represented by the author that the later canon law departed from or unduly developed the earlier, are the exclusive jurisdiction of the church over ecclesiastics, and the extension of the canon law to secular affairs. As to the former, the canons of Edgar declare both in the clearest manner, "We enjoin that no dispute between priests be referred to secular courts; but let them adjust it among themselves, or refer it to the bishop, if needful" (*Ang.-Sax. Law*, v. ii. p. 247). "And we enjoin that every priest declare in the synod if in his district he knows any man contumacious to God, or sunk in sin, whom he cannot incline to amend, or care not for worldly opinion" (*Ibid.*). And in the Civil and Ecclesiastical Institutes it is laid down, "To a bishop belongs every direction, both in divine and worldly things. He shall in the first place inform men in orders, so that each of them may know what properly it behoves them to do, and also what they have to enjoin to secular men. He shall not consent to any injustice, nor false weights or measures; but it is fitting that every legal right go by his counsel, and that every balance and measure be by his sanction very exact, lest any man should wrong another, and thereby sin" (*Ibid.* 313). These latter words clearly convey the whole scope of the canon laws, and the principle on which it entered into secular matters; that is, entirely *in foro conscientie*, and with a view to spiritual correction. And this, unless so far as the state chose to enforce it, was, of course, entirely of voluntary observance, and had no force or obligation save in conscience; in other words, to

But a compilation of canon law was made by *Ivo de Chartres*, in the time of Henry I. containing many extravagant opinions (a), calculated to advance the dominion of the pope, and the preten-

the extent to which a man's own conscience or moral sense impelled him to observe it. It was a purely moral power, and had no connexion with the domain of the municipal law, except so far as enforced by the state, which was its own voluntary act, resulting from the collective conscience of the community, and a sense that it was right so to enforce it. To represent the canon law, therefore, as encroaching, by reason of its extension, upon the municipal law, shows an entire misapprehension. These domains were so entirely distinct and independent, that the greatest possible extension or development of the former could not encroach upon the latter. How could moral law encroach on municipal? The canon law was entirely moral law, resting on religious liberty and spiritual sanctions; and so far as the state did not interfere, a man was free to regard it or disregard it as he pleased. In the only matters on which there was an appearance of interference with the secular law, the claim of exclusive jurisdiction over ecclesiastical persons and property, the canon law followed the municipal law; for, as already seen, it had been the law for ages, and a law in those times extremely rational, although the reasons upon which it rested have long since disappeared. To represent these claims, therefore, as encroachments, is an historical error. In point of fact, they were not encroachments, for they rested on the consent of the state. And to the full extent, in all other respects, the legality of canon law and civil jurisdiction was recognised by the law.

(a) The learned author did not appreciate the grounds on which the canon law rested. The popes themselves, whose decrees formed the bases of the decretals, always put the exercise of their authority either upon the ground of spiritual direction to men as the members of the church, and acknowledging her spiritual authority, or upon the authority derived from the acknowledgment and the recognition of the church by the state. Thus, for instance, Pope Gregory VII. based his decree, deposing the emperor, upon authority derived from human laws—the laws of the empire, as well as upon his spiritual authority over the emperor as a member of the church, “propter quæ (i.e., sceleribus suis) eum excommunicari, non solum usque ad dignam satisfactionem, sed ab omni honore, regni, debere destitui, divinarum et humanarum legum testatur auctoritas” (*Vita Greg. VIII., Benried, c. lxxviii.; Muratori, Rer. Ital. Script., tom. iii., part 1, p. 357*). Rightly or wrongly, it was the view of the popes, and of most people in those days, that the laws of the empire gave the pope the power to declare this; and so it was professedly based upon human laws. So Pope Innocent III., by whom the pretensions of the Roman see were certainly pressed as far as by any pontiff, put it entirely upon his pastoral power over members of the church, and upon his acknowledged function as its head, and *disclaimed any temporal power except as far as conferred by the laws of the state*. “Non enim intendimus judicare de feudo, cujus ad ipsum (regem Gallie), spectat judicium, nisi forte jure communi, per speciale privilegium vel contrariam consuetudinem, aliquid sit detractum; sed decernere de peccato, cujus ad nos pertinet sine dubitatione censura, quam in quemlibet exercere possumus et debemus” (*Decretal, lib. ii., tit. 1; De Judiciis, c. xiii.*). According to this, it is obvious the papal power was one of mere spiritual direction, *in foro conscientie*, resting only on moral sanction; or it was an emanation from the secular law, derived from state concession; in either case, no assumption antagonistic to state power. The excommunication was pronounced under the former power; its effect, as to deposition, entirely depended upon the latter—that is, upon the laws of the state. It was a consequence of excommunication, according to the belief of the age, founded on the laws of the empire, with reference to the oath, and the condition of allegiance. And as the former was based upon the acknowledgment of the spiritual authority of the church and of the pope as its head, it could make no pretensions to the exercise of the jurisdiction where that authority was not acknowledged; so that it rested entirely on voluntary acknowledgment. The pope simply administered the laws of the church as its head, between those who acknowledged those laws, and acknowledged him as its head. Moreover, at the age when this jurisdiction was exercised, it was so entirely in accordance with the popular belief, that it was the expression of the popular will. Voltaire admits this general belief. Speaking of the great struggle with the empire, he says, “Vous en verrez l'unique origine dans la populace; c'est elle qui donne le mouvement à la superstition” (*Essai sur les Mœurs, tom. iii. c. xlvi.*). He terms it, indeed



sions of the clergy. After this, and about fourteen years after the discovery of the Pandects, in the year 1151, a more complete collection of canon law was made by *Gratian*, a Benedictine Monk of

a superstitious feeling, but he admits its universality in that age ; and it has been seen that it had a strong foundation in the laws of the empire. The princes themselves, he elsewhere says, admitted the jurisdiction, they everywhere had recourse to it (*Ibid.* tom. iii. c. lxiv.). It can scarcely be deemed surprising that the papacy should, in such an age, have exercised a jurisdiction with which it appeared to be invested by the traditions of ancient law, by popular belief, and even by the acknowledgment of sovereigns. Quoting the language of the popes in the middle ages, Voltaire says, "Quelques téméraires que paraissent les entreprises, elles sont toujours la suite des opinions dominantes. Il faut certainement que l'ignorance eût mis alors dans beaucoup de têtes que l'église était la maîtresse des royaumes, puisque le pape écrivait toujours de ce style" (*Essai sur les Mœurs*, tom. iii. c. xlvi.). It might be the result of ignorance ; and no doubt, in that age, the clergy possessed most of the knowledge, and therefore most of the influence : but the fact is beyond dispute, that these were the dominant and prevalent opinions of the age, and that therefore, in the exercise of this jurisdiction, the papacy acted as much in accordance with public opinion, as it would now be acting in defiance of it, were it to pursue a similar course. Even in that age, the popes never went in temporal matters beyond public opinion. Thus the popes knew the distinction between excommunication and deposition, and while they asserted the former power upon all occasions, and in every age, over the members of the church, of which they were the leaders, they never pronounced a prince deposed except when they knew they only registered the public voice. Thus, so early as the sixteenth century, at the very foundation of our Saxon monarchy, the pontiff, to whom the Saxons owed their conversion, Gregory the Great, declared, "Si quis regum, sacerdotum, judicum, personarumque sæcularium hanc constitutionis nostræ paginam agnoscens, contra eam venire tentaverit, potestatis honorisque sui dignitate careat, reumque se divino judicio existere de perpetrata iniquitate cognoscat" (*Greg. Epist.*, lib. xiii. ; *Epist.* viii. 9, 10). Thus Gregory VII., having pronounced excommunication, declared deposition as the consequence, according to the law of the empire, knowing that public opinion supported that view. But as Voltaire points out in a subsequent case, the pontiff pronounced excommunication, but not deposition. "Il est très remarquable que dans ces longues dissensions le pape Alexandre III. qui avait fait souvent cette cérémonie d'excommunier l'empereur, n'alla jamais jusqu'à le déposer." He adds, "Cette conduite ne prouve-t-elle pas non seulement beaucoup de sagesse dans ce pontife ; mais une condamnation générale des excès de Grégoire VII." (*Essai sur les Mœurs*, tom. iii. c. xlviii.) ; but Voltaire forgot that the popes well knew they had no proper power to depose, as they deemed they had to excommunicate, and that the deposition was another matter altogether, which must depend upon public opinion, and the circumstances of the times ; and he admits the sagacity of the pontiff in the course which he pursued on the occasion. What, however, is most important is, that the popes knew and observed the distinction between the power of spiritual direction and power of temporal rule, which could only be derived from the consent of the state, and the general voice of the people ; and could only be properly exercised for their protection, or in support of justice, of liberty and of law. That it would, so far as it was so exercised, not be in opposition to, but in favour of, liberty and law, is admitted by Voltaire, and by the most enlightened historians of our own or any other country. Thus Voltaire says, speaking of the struggle between the pope and our Henry II., "L'intérêt du genre humain demande un frein qui retienne les souverains, et qui mette à couvert la vie des peuples. Ce frein de la religion aurait pu être par une convention universelle dans la main des papes. Les premiers pontifes en ne se mêlant des querelles temporelles, que pour les apaiser, en avertissant les rois et les peuples de leurs devoirs, en reprenant leurs crimes, en réservant les excommunications pour les grands attentats, auraient toujours été regardés comme des images de Dieu sur la terre, mais les hommes sont réduits à n'avoir pour leur défense que les lois et les mœurs de leurs pays, lois souvent méprisées, et mœurs la souvent corrompues" (*Essai sur les Mœurs*, tom. iii. c. i.) It has always been forgotten that, rightly or wrongly, the popes, in their contests with the emperor, always maintained and based their jurisdiction upon the fact, that the emperor had taken oaths of fidelity to them, and had contracted, owing to the peculiar relations of Italy and Germany, feudal obligations to them ; and the



Bologna, and was published under the title of *Decretum*: it was made in imitation of the Pandects, and was a *digest* of the whole *pontifical* canon law. This is a collection of opinions and deci-

fact is beyond dispute, that the emperor did take oaths of fidelity to the popes, which are inserted in the "Decretum of Gratian," and to be found in the *Corpus Juris Canonici*, and this oath is admitted by Bossuet to imply at all events a great degree of obedience or submission. It is not material here whether the papacy was right or wrong in its view. The important point to keep in view, in its bearing on legal history, is, that the papacy always based its temporal jurisdiction upon this assumption, *i.e.*, upon the assumption of an acknowledgment of it, just as the popes based their spiritual jurisdiction on the acknowledgment of it, and the recognition of them as the heads of the church. That the deposition of a sovereign was a consequence of his excommunication was the general belief in this, as in every other country in that age. Thus, in the reign of Henry II., John of Salisbury, whom Sir J. Mackintosh describes as far beyond his age in learning, and who was an attached friend and adviser of Archbishop à Becket, held that as an admitted principle, and so speaks of the pope as "Vicarius Petri, a Domino constitutus super gentes et super regna" (*Joannes Salis.*, ep. 210; *Biblioth. Patrum*, tom. xxiii.). Nay, more, kings themselves—as our Henry among the number—admitted the jurisdiction, and only disputed its exercise; this is manifest from the contemporary accounts left by that eminent prelate, or the letters of the archbishop, for it appears that when Cardinal Gratian asserted it in his conferences with the king, the latter, so far from resenting or protesting against it, desired the council to testify his desire or reconciliation, "rex rogavit ut testificarentur vires quanta et qualia obtulerat, restitutionem scilicet archiepiscopatus et pacis" (*Ep. Fl.*, lib. iii. ep. 61). This being the view of the popes themselves, it is to be expected that they would also be the views of the compilers of these decretals, Ivo and Gratian, and so it is; and these ancient authorities on the canon law base their doctrine as to the jurisdiction of the church, primarily, on its "directive" authority, purely spiritual and voluntary, and exercised only *in foro conscientie*, and, secondarily, on its recognition by the civil law itself (*Ivonis Decretum*, part v., c. 378). And in his letter to our Henry I., although he asserts that the temporal power ought to be subject to the spiritual, he shows his consciousness that, to the extent to which it is so, it must be the concession of the state. "Celsitudinem vestram obsecrando monemus, quatenus in regno vobis commissi verbum Dei currere permittatis, et regnum terrenum cœlesti regno, quod ecclesiæ commissum est, subditum esse debere semper cogitatis; sicut enim sensus animalis subditus debet esse rationi, ita potestas terrena subdita esse debet ecclesiastico regimini" (*Ivo de Chartres*, epist. 101)—language which, no doubt, (naturally enough, in an age when ecclesiastics had all the knowledge) implies that the church represented the intellectual power of the age, and ought to be superior; but at the same time also implying that it could only be so by the concession of the state, and that it was not the prerogative of the church by divine right. So Gratian's doctrine is in substance the same (*Gratiani Decretum*, part i. dist. 96, c. x.). The contrary notion, founded on an isolated sentence—"A fidelitatis etiam jramento Romanus pontifex nonnullos absolvit, cum aliquos à sua dignitate deponit" (*Ibid.*, causa xv., quæst. vi., c. iii.)—is disproved by the context, and the whole texture and tenor of the authorities he cites. So Hugo de St Victor, who thus distinguishes the temporal and spiritual powers: "Secundum causam justitia determinatur, ut videlicet negotia sæcularia à potestate terrena, spiritualia vero et ecclesiastica, à spirituali potestate examinentur; sæcularis autem potestas caput habet regem, ab illo per subjectas potestates, et duces, et comites, et præfectos, et magistratus alios descendens; qui tamen omnes à prima potestate auctoritatem sumunt, in eo quod subjectis prælati existant" (*Ibid.* c. viii.). The interest of all this here, and its bearing on the history of the English law is, that the doctrines thus laid down formed the basis of those denounced in the text, and were afterwards the subject of the great contest between the church and state in the reign of Henry II., which forms one of the most memorable epochs in our legal history; and that much the same doctrines will be found laid down in Bracton, who, more than any other ancient author, is regarded by Lord Coke himself as the parent of the English law. Enough has now been stated to enable the reader to form a judgment upon that great controversy, and to appreciate the above observations of our author. All that he has to bear in mind, however, is, that the question as to the merits of that controversy

sions; extracted from sayings of the fathers, canons of councils, and, above all, from decretal epistles of popes; all tending to exalt the clerical state, and to exempt the clergy from secular subor-

depends not upon the ideas now entertained, but upon those which were entertained in the age in which it arose. So far from the canonical law or the writers upon it being so extreme in their views as is represented by the author, the very canonist whom he cites as the chief expounder of the extravagant doctrines he denounces—Ivo of Chartres—vindicated the right of the pope to pronounce the sentence of excommunication against sovereigns, as founded on the laws of the state, as well as of the church (*Ivonis Decretum*, part v. c. cclxxviii.). And in his letter to our Henry I., already quoted, this eminent prelate only puts it upon the ground of the union between the church and the state, and of liberty allowed to the church to carry out its discipline in a country where the church and its discipline are acknowledged. And while he implies the subordination of the temporal to the spiritual, in the sense of what theologians call the directive power, he says not a word which implies a jurisdiction of divine right over temporalities; but teaches that this is founded on divine and human laws (*Ivo de Chartres*, epist. 106). All this, it is evident, was not understood by the author, in whose exaggerated representation may be observed the influence of prejudice, arising from that cause. It is in very different language Hallam writes. Speaking of the civil law, he says: "Some of the more ancient ecclesiastics, as Hinemar, and Ivo of Chartres, occasionally refer to it, and bear witness to the regard which the Roman church had uniformly paid to its decisions" (*Midd. Ages*, c. viii.). And our author himself says, a little further on, that the canon law was founded on the civil. Not having read the laws of Henry I., he was not aware that not only, as Hale says, they "had a taste of the canon and civil law," but that whole passages are taken from the canon law—that is, the later canon law, which he denounces as so full of what was "extravagant," though Hale had observed nothing in those laws to provoke animadversion; and the compilation forms the foundation for the great treatise of Glanville, the basis of our common law. The foundation of the canon law is laid in the decrees of councils, and in the rescripts, or decretal epistles of the popes to questions propounded upon emergent doubts relative to matters of discipline and ecclesiastical economy. As the jurisdiction of the spiritual tribunals increased, and extended to a variety of persons and causes, it became almost necessary to establish a uniform system for the regulation of their decisions. After several more compilations had appeared, Gratian, an Italian monk, published, about the year 1140, his *Decretum*, or general collection of canons, papal epistles, and sentences of fathers, arranged and digested into titles and chapters, in imitation of the Pandects, which, very little before, had begun to be studied with great diligence (*Midd. Ages*, c. vii.). But he adds that Gregory IX. caused the five books of decretals to be published in 1234, and that these form the most essential part of the canon law, the *Decretum* of Gratian being obsolete. "In these books," he says, "we find a regular and copious system of jurisprudence, derived in great degree from the civil law, but with considerable deviation, and possibly improvement" (*Ibid.*). And a sixth was afterwards added, containing subsequent decisions. Of the body of canon law, Hallam observes: "The superiority of the ecclesiastical to temporal power, or, at least, the absolute independence of the former, may be considered the key-note which regulates it," and then he cites several passages, which, it may be presumed, were about the strongest he could select, by every one of which, it will be seen, the proposition is limited to spiritual or ecclesiastical matters. "Constitutiones principum ecclesiasticis constitutionibus, non præminent, sed obsequuntur" (*Dec.*, dist. 10.) "Statutum generale laicorum ad ecclesias vel ad ecclesiasticas personas vel eorum bona, in eorum præjudicium non extenditur" (*Decretal*, l. i. tit. ii. c. x.). "Quæcunque à principibus in ordinibus vel in ecclesiasticis rebus decreta inveniuntur, nullius auctoritatis esse monstrantur" (*Decretum*, dist. 96). The historian gives his readers the opportunity of observing this by quoting the terms of the decretals. And although he goes on to say, "It is expressly declared that subjects owe no allegiance to an excommunicated lord, if, after admonition, he be not reconciled to the church," and cites the following rubric from the decretals (i. 5, tit. xxxvii. c. xii.):—"Domino excommunicata manente subditi fidelitatem non debent; et si longo tempore in ea perstiterent, et monitus non pareat ecclesiæ, ab ejus debito absolvuntur"—the historian has the candour to add: "I must acknowledge that the decretal epistle of the Pope scarcely warrants this

dination. The applause this book received from the see of Rome and the clergy, raised it soon above all former collections; and it became the grand code of ecclesiastical law, upon which the popish hierarchy rested all its hopes and pretensions.

The canon and civil law had before been studied and professed by the same persons; and the union of these two laws was now drawn closer. The canon law was from the beginning under great obligations to the civil; the very form in which it now appeared was evidently borrowed from thence; and whatever was most excellent in it, was acknowledged to be copied from that model (*a*).

general proposition of the rubric, though it seems to lead to it." And though he quotes another rubric:—"Papa imperatorem deponere potest, ex causis legitimis" (c. ii. tit. xiii. c. 2), he adds, "The rubrics to the decretals are not, perhaps, of direct authority as part of the law, but they express its sense." And no doubt, at the period now in question, these papal pretensions were maintained. But then they were maintained, in the first place, as against sovereigns, who professed to be subject to the Roman see, as members of the Roman church, of which that see was the head, and who acknowledged the authority of the pope as the vicegerent of Christ; and, in the next place, these pretensions were entirely in accordance with national law, and proceeded upon premises laid down in that law. This has already been amply shown, so far as regards this country, from the Saxon laws, in which the authority of the pope is recognised in many ways: by the payment of Peter's pence, or Rome's fee, as it was called, which is enforced all through the Saxon laws up to the Conquest; by recognition of the papal authority, not only in matters in their nature ecclesiastical, at variance with secular law, but even as regards the clergy, in matters in their own nature properly municipal: as in cases of murder by a priest; and, in short, by his being practically and expressly recognised as the supreme spiritual authority. All that was done in the most extreme or extravagant pretensions of the canon law, with respect to papal or civil authority, was simply to carry out these premises, granted by municipal law itself, to their extreme logical conclusions. And no authority can be found (it is believed) for any such pretensions, except as to states which had made such concessions and laid down such premises. Whence it is that, in modern times, when such principles are not admitted, we hear of no such pretensions. But it is most important, in forming a judgment upon the acts or conduct of men in distant times, to take into consideration the circumstances under which they took place; and in judging of the contests between the civil and ecclesiastical power at this period, it is necessary to bear in mind the *premises admitted at the time on both sides*, which the author has failed to observe.

(*a*) It may be of interest here to present an analysis of the canon law, or of the contents of the decretals, their chief and most authentic source, from which may be derived, in some degree, a just idea of their nature, and also how far our own laws may have derived advantage therefrom. Lord Hale states, as to the laws of Henry I., that they have a "taste" of the canon law. He might have gone further, and said that entire passages are taken therefrom, and that large portions—most of that which relates to the important subject of the *principles* of procedure, were founded thereon; and further, that these laws form the basis of the treatises of Glanville, Bracton, and the *Mirror of Justice*, the most authentic sources of our own law. So that the author, in deriding or denouncing the canon law (of which it has been shown he knew little or nothing), was really deriding and denouncing the sources whence our own law, in a great degree, was derived. The canon law was simply the civil law adapted to the use of a country acknowledging the Roman church as the head. The first book of the decretals treats, in the first place, therefore, of the doctrines of that church, the acknowledgment of which is presumed and supposed to be the basis of all the rest. It was in forgetfulness of this that the fundamental fallacy of our author lay. The canon law professes, at the outset, to be the canon law of countries which acknowledge the Roman church. The next book treats of rescripts, constitutions, and customs, and their authority; then the law as to election, confirmation, and consecration of bishops, the resignation or renunciation of benefices, and other purely ecclesiastical matters; then as to discipline

These two systems now became so connected, and in so near a degree of relation, that a learned writer says, the one could not subsist without the other. They afforded each other a mutual

of the clergy.\* Next there comes a head of ecclesiastical law, which formed the basis of our law of legal terms; and that was the law as to the *Pax Dei* or *Pax Ecclesie*—the peace of the church—*i.e.*, sacred periods, during which war or litigation ought not to be allowed, and which the ecclesiastical authorities, therefore, were to procure to be observed, so far as it was possible for them to do so; and accordingly, in order to enforce observance of these periods or intervals, they were to issue excommunications against those—that is, members of the Roman church—who failed to observe them. It may here be observed that excommunication, as the phrase itself implies, was simply a putting out of communion—*i.e.*, the communion of the Roman church; whence, of course, it followed that it did not *apply*, except to members of that church, nor *affect* those who did not care to be so. Under this purely spiritual penalty, the periods of the peace of the church were observed; and during those periods, neither priests nor laymen, nor chartmen nor rustics, either going to the field, or being in the field, or coming from the field (the origin of our legal phrase as to privilege from arrest—*eundo et redeundo*), or the cattle with which they ploughed, could be arrested or seized. Again, it was laid down to be the duty of judges, before men entered into a lawsuit, to persuade the parties by private covenants and agreements, to compound the controversy between them; and this, there is little doubt, led to the devising of fines, or concords in court, which became used in the time of Henry I., and which the learned Hargreave considered were originally real concords of really existing suits. So also, there can be little doubt that this led to the encouragement of arbitration in our courts, which is to be observed from the very earliest records of these proceedings. Various rules and principles are laid down as to arbitrations and arbitrators, which form the basis of our rules of law upon the subject. And be it observed, that for a century or two after the Conquest, during which our law was moulded, the chancellors and chief judges were ecclesiastics, and *took their ideas of law from these very volumes now under analysis*. Again, if, pending a suit, a party alienated away the subject-matter, he was nevertheless held liable to answer for it as though he were still owner of it; and this, again, formed the basis of our rules of law or equity as to *lis pendens*, or fraudulent alienations, pending a suit. In short, the greater portion of this first book of the Decretals deals, and deals admirably, with the subject of litigation. The second book expounds the principles of *procedure* and *judicature*, a competent court, a proper citation, and declaration of the cause of suit. Then came the “exceptions,” a phrase borrowed from the Roman civil law, and from the civil and canonical law, adopted by our earliest legal authors—Glanville, Bracton, and the *Mirror*, and in the statute of Westm. Then the nature and the order of rights is laid down: as, that rights or causes which convey possession—causes “possessory,” as they were and are called—are first to be determined before a right of property, and that he who has been forcibly expelled from or deprived of property, is first to be *restored* to the thing or place of which he has been thus deprived, even although he has no other than a possessor’s right, and has *not* the right of property—a principle founded upon the doctrine of the Roman law, which has already been noticed, and forming the basis of our whole law of disseisin or forcible dispossession of property, of which the possessor can obtain restitution irrespective of actual strict right. Then, as to the procedure for the elimination of the question in dispute; if the facts were admitted, then, it was pointed out, it became a question of law for the judge, and not a question of fact; and the judge, upon the admitted facts, was to pronounce judgment—a principle, that of the separation of the law from the fact, which, as Sir James Mackintosh observed, formed the basis of our whole system of procedure, and which, he adds, it is impossible not to admire (*Hist. Eng.*, v. i.); although it is true, that afterwards, under *lay* judges, often so ignorant as to mistake technicality for subtlety, the system was rather perverted. If the facts were not admitted, then they were to be determined by witnesses, instead of by the absurd ordeal or the brutal duel, and after proofs on either side, judgment was to be given on the facts thus ascertained, with provision for appeal. With some alterations as to the *mode* of taking evidence, this system formed the basis of our system of trial, superadding the jury in common law cases, though not, until ages later, making them judges of evidence, not mere witnesses; while, in some of our courts, the canonical system of trial continued until

support; they had the same professors; and it was requisite to the fame and preferment of a churchman, that he should be both a civilian and a canonist.

When these two laws were brought into this high repute, *Vacarius* came into England, and, A.D. 1149, towards the end of Stephen's reign began to read lectures, at Oxford, on the canon and civil law. Upon this an alarm was raised, and the king, apprehensive of the consequences to which these new doctrines might lead, in the year 1152, or thereabouts, is said to have forbid the reading of books of the canon law<sup>1</sup> (*a*); a prohibition that could not be meant to extend to that canon law which had long been admitted and ratified, but probably only to the novel and bold opinions contained in the collection of *Ivo de Chartres*, and more particularly in that lately made by *Gratian*.

Indeed the use of the canon law became now a subject of very serious consideration. The canons before admitted here were very ancient; many of them had received a legislative sanction, and by long continuance they had ingrafted themselves into the constitution of the country; but a set of opinions entirely new was advanced by the publication of the *Decretum*, which, from the parade of the

our own time. The third book of the *Decretals* treats of such civil matters and causes as were deemed to be triable in the ecclesiastical courts—as the conduct of ecclesiastics, non-residence, and the like. So it treats of the possessions of the church, and when they may be alienated, &c. It treats also of wills and testaments, and of succession in cases of intestacy; of tithes and of first-fruits; of the right of patronage, &c. And it is laid down that ecclesiastical persons are not to trouble themselves about civil matters, contrary to their office and profession; in accordance with which, under Henry II., Archbishop A'Becket gave up the chancellorship; and the Roman see objected strongly to ecclesiastics taking political and judicial office, although in an age when few of the laity were competent for civil offices, it was necessarily, to a great extent, tolerated that ecclesiastics should hold them. The fourth book treats of matters matrimonial, and of legitimacy, as to which the canon law was assumed to be that marriage legitimated previous issue. The fifth book treats of such *criminal* matters as are dealt with in the ecclesiastical courts, expounding offences according to their moral and religious aspect, as *in foro conscientie*. The decrees—that is, general, not made at any suit—were first collected by Ivo of Chartres, A.D. 1114, and were completed by Gratian in 1149. The first volume of the *Decretals*, which were royal epistles at the suit or instance of some party for the determination of any controversy, were put forth in 1231, and ordered to be read in schools. The second was half a century later; but, as our author elsewhere observes, many of the decrees or decretals had obtained currency long before they were collected.

(*a*) But Selden, recording this, adds—"Sed parùm valuit Stephani prohibitis nam eo magis invaluit virtus legis, *Deo favente*, quo eum amplius nitetur impietas subvertere," (*Dissert. ad Flet.*, c. vii., p. 6). And Sir J. Mackintosh says, that "the civil law was taught with *applause* by Vacarius, as we are told by his pupil, John of Salisbury—the friend of Becket, distinguished in the learning of the age," (*History of England*, v. i.). And elsewhere the historian speaks with just contempt of Stephen as "a captain of banditti" (*Ibid.*, *Steph.*). That the study of the law should have been forbidden by such a man, is its highest praise. Mr Hallam's account of the matter is this: "The students of scholastic theology opposed themselves, from some unexplained reason, to this new jurisprudence, and these lectures were prohibited" (*Midd. Ages*, c. viii.). The prohibition, doubtless, arose from that jealousy which was incident to an ignorant age; the name of the Roman law associating it with the pretensions of the papal power, which began to be viewed with hostility.

<sup>1</sup> Joh. Salisb. de nug. curia.

work and the support it received from the see of Rome, had the appearance of a promulgation of laws imposed on the Christian world by the sole and supreme authority of the pope. From a question on the *utility*, as it had been before in some respects, it became now a question upon the *authority* of these laws.<sup>1</sup> The contest between the secular and ecclesiastical state was thenceforward more violent, as the points upon which it arose were more important.

Notwithstanding the prohibition of king Stephen, the study of the civil and canon law was universally promoted by the clergy. Educated in opinions calculated to promote the benefit and emolument of their own order, it was not much to be wondered, that they struck in with the designs of the pope, and stood firmly upon the maintenance of their own pretended rights and privileges.

The active spirit of the clergy did not want instruments to work with: the body of canon law lately published by *Gratian* furnished authority and arguments for every species of usurpation.

The doctrines of the canon law, as delivered in the *Decretum*, tended to mark more strongly the distinction between the clergy and laity, and the great deference due to the former. It is there laid down, that a custom against the decree of a pope is void; and that all men must observe the pope's command (*a*). It is made an anathema to sue a clergyman before a lay judge; if a lay judge condemn or destroy a clerk, he is to be excommunicated; a clerk may implead a layman before what judge he pleases; judges who compel a clerk to answer to a suit before them, shall be excommunicated; a layman cannot give evidence against a clerk; with numberless extravagancies of the same kind (*b*). Such notions did the canonists propagate for law respecting churchmen, in the reigns of Henry II., of Richard, and of John.

Indeed it was not till these doctrines had generally prevailed,

(*a*) That is, all members of the Roman church, who acknowledge him as the head of their church, and in matters which involve religious or ecclesiastical questions. These important qualifications are omitted by the author, and make all the difference in the world. That a custom, against a decree of the pope, should have been held void, in a country acknowledging the pope as the head of its church, was only natural, seeing that the papal decrees were only upon such matters in which religious questions or ecclesiastical interests were involved. There would surely have been an absurd inconsistency in holding, in such a country, that a custom, contrary to what the head of its church declared on such subject, was nevertheless valid.

(*b*) "Extravagancies," nevertheless, to be found in the Saxon laws, as already has been shown, and all of which, except so far as expressly altered, were repeatedly confirmed at the Conquest. It is obvious that in that age they were not considered "extravagancies," and that is the important point. That they would be so now is certain, for many reasons; but there is no greater extravagance of absurdity than making the ideas, the circumstances, the impressions of a modern age the standard or the measure of another and a distant age. Yet this form of fallacy is prevalent in most histories of the middle ages. That it has been even to some extent avoided by such writers as Sir J. Mackintosh and Mr Hallam, is one of the greatest of their many merits. But it was not always avoided by our author.

<sup>1</sup> Litt. Hen. II. vol. ii. 471.

that the separate establishment of ecclesiastical judicature gained much strength. It was not till the publication of the *Decretum*, and the growing authority of the canons had given some order, consistence, and stability to spiritual government, that the exclusive jurisdiction of these courts was an object of very important consideration, or that their claims were urged to any great extent.

Some causes, apparently clerical, had continued to hang about the temporal courts, particularly those concerning tithes; which, being the issues of freehold property, and so partaking of its nature, could hardly be considered as merely spiritual.<sup>1</sup> Accordingly such pleas were held both in the ecclesiastical and temporal courts till the time of Henry II. After that, tithes came under the notice of our courts of common law only in an indirect proceeding; such as on prohibitions, writs of right of advowson, or by *scire facias*,<sup>2</sup> an ancient proceeding since abolished by parliament.<sup>3</sup> The prerogatives of the hierarchy, and the jurisdiction of the ecclesiastical courts assisted each other in extending their influence. The courts grew in authority and the bishops rose in their pretensions.

Amongst other attempts to aggrandise themselves, the clergy did not omit so valuable a subject of acquisition as benefices. A benefice, being an eleemosynary provision for a person who officiated in the discharge of religious duties, was originally in the sole disposal of the founder, and was conferred, like other donations, by investiture; but the bishops, as having the superintendence over spiritual things, claimed a right of control over these gifts (a).

(a) This is not a correct representation. The bishops claimed what they had always had, the right of appointing the clergy, just as the pope, as the head of the church, claimed the right of appointing the bishops, on the general principle that these offices were all pastoral, and purely spiritual. Nor was this claim disputed until they had long become the subject of *endowments*, nor even then, until after the feudal system had become firmly established; and it was then insisted that the temporalities were benefices, or were fiefs, in the feudal sense, and subject to feudal incidents, one of which was the right of the crown, or the patron, to confer them (so as to secure a veto upon the appointment), and also to have the custody of them when vacant, so that by combining the veto with the power of possession during vacancy, the king might secure the possession of the temporalities until he coerced the pope into the appointment of some corrupt prelate, with whom he could make his own arrangements as regarded the inferior clergy. What they would come to, no one with the least knowledge of history can doubt; and it is thus described by Sir J. Mackintosh: "The power of nomination (for such it was) had been converted by secular powers into an indecent and scandalous means of raising money, by setting up for sale the dignities and benefices of the church" (*Hist. of Eng.*, vol. i., p. 147). This, the historian says, was the result of the claim of the king, which "involved a previous negative on every choice, and, in effect, amounted to the ecclesiastical patronage of Europe" (*Ibid.*). So Mr Hallam says—"The sovereigns, the lay patrons, the prelates, made their powers of nomination and investiture subservient to the grossest rapacity," to which he ought to have added, *the prelates appointed by the sovereign*; the great object was the struggle, on the part of the sovereign, to get control over the appointment of the bishops, so as to be enabled to obtain, by corrupt arrangement with them, control over the appointment of the clergy. And this, indeed, was the next important feature in the matter; for, of course, to have all Christendom covered with a corrupt and ignorant clergy, would have been destructive of Christianity. And Mr Hallam says—"Through bribery, or through

<sup>1</sup> Seld. Tithes, 387.

<sup>2</sup> *Ibid.* 422.

<sup>3</sup> By Stat. Ed. III.



This occasioned a contest between patrons and the bishops for many years ; till at length the ancient way of investiture entirely ceased about the reigns of kings Richard and John, and lay-patrons became obliged first to present their clerks to the bishop, who, according to his discretion, gave them *institution*.<sup>1</sup> A like method of filling vacant bishoprics was claimed by the pope ; but the

corrupt agreements with princes, a large proportion of the bishops had no valid tenure in their sees. The case was perhaps worse with the inferior clerks" (*Midd. Ages*, c. v.). As to the importance of the question, therefore, there can be no doubt; neither can there be any doubt in the mind of any lawyer as to the utter absence of any pretence for the claim set up by the sovereigns. This can be shown in many ways. The shortest and clearest way, perhaps, is to refer to the general principle already alluded to, that these offices were pastoral and purely spiritual, and that by the constitution of any country acknowledging the Roman church, and the pope as the head of it, and as the supreme pastor, the nomination of episcopal pastors must pertain to him, and of parochial pastors to the bishops. And, as already noticed, this claim was not disputed, until some time after the Conquest, nor until after the establishment of the feudal system, when the grossest oppressions and exactions took place ; as was noticed and acknowledged in the *Leges Henrici Primi*—"Quia regnum oppressum erat, injustis exactionibus:—ego sanctam Deo ecclesiam liberam facio, ita quod nec vendam, nec ad firmam ponam: nec, mortui archiepiscopo sive episcopo, vel abbate, aliquid accipiam de dominio ecclesie donec successor in eam ingrediatur" (*Anglo-Saxon Laws*, vol. i. p. 498). So that it is certain, as it is solemnly recited in a legal record, that these things had been done by the Conqueror and his sons ; the voice of contemporary history (in the chronicles) also abundantly attests it, and it there appears that, as above stated, kings set up a claim to practise upon the endowments of the church the same exactions and oppressions which they practised on the other estates of the realm, upon the pretence that the feudal principles applied. That this pretence was false and unfounded, has already been shown from Littleton, who, long after these controversies was over, laid it down as undoubted law, that in tenure by frankalmoigne (which is the tenure of bishoprics and other benefices), there is *no temporal service due at all, as the service is purely spiritual*. And, as already has been shown, the whole scope and tenor of the Saxon law was to leave to the church the control of what was spiritual. It is fully admitted by all the writers who uphold the royal claim now, and is implied by our author in his use of the feudal word, investiture, that it was based upon feudal principles, and, therefore, was unfounded. The pretence that because the *endowment* was temporal, the benefice became no less clearly fallacious, for it was a well-known maxim that the principal draws it to the accessory, not the accessory the principal. And this, in fact, was the whole point of the question, whether the spiritual was to yield to the temporal, or the temporal to the spiritual. Of course, the rapacious sovereigns who ravaged after church spoil, and kept sees vacant in order to enjoy it, or to force the pope to sanction the appointment of corrupt men, who would allow them to share the plunder of the diocese, and farm out benefices to the highest bidders ; of course they deemed the temporalities the most important, and cared little for the spiritualities. But the original donors, who were not merely sovereigns, but multitudes of other persons (as the statutes state), gave the endowments in aid of the spiritualities and in support of the church, not for her enslavement and subjection. They gave to the church as she then existed—viz., free, and under the spiritual care of her pastors ; and it would be irrational to suppose that they meant their donations to be the foundation of future usurpations. That, therefore, which the author, unaware of the contents of Henry I.'s charter, represents as an innovation introduced in the reigns of Richard and John, had been the original usage, and had been wrongly violated by the Conqueror and his sons, as Henry I. confessed. It will be apparent that the great, the fundamental question was as to the appointment of the bishops ; for if the king could either appoint them at his pleasure or keep the temporalities of the sees in his hands until his nominee was admitted, the whole of the diocese would virtually be in his hands ; and such kings as then reigned were capable, as the chronicles show, of any amount of corruption, plunder, or oppression.

<sup>1</sup> *Seld. Tithes*, 383.



spirited resistance of some of our kings defeated all his attempts ; though, as usual, he never receded from the pretended right.

The appointment, however, to bishoprics, was, to a degree, put under the control of the pope (a). In the time of Henry I. a bishop elect was to receive *investiture* of his temporalities from the king, of whom all bishops held their lands as baronies (b). This was performed by the king's delivering to the bishop a ring and crosier, as symbols of his spiritual marriage to the church and of his pastoral office ; and hence called investiture *per annulum et baculum* : after this the bishop used to do *homage* to the king, as to his liege lord. But that king finding it expedient to give way to the demands of the pope (c), resigned this power and ceremony of investiture, and only required that bishops should do homage for their temporalities : and king John, to obtain the protection of the pope, was contented to give up, by charter, to all monasteries and cathedrals, the free right of electing their prelates, whether abbots or bishops. He reserved only to the crown the custody of the temporalities during the vacancy ; the form of granting a licence to proceed to election (since called a *congé d'élire*), on refusal whereof the electors might make their election without it ; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause (d). This grant was expressly recognised and confirmed by king John's *Magna Charta* ; was again established by stat. 25 Ed. III. st. 6, c. 3 ; and continued the law and practice till the time of Henry VIII.

To return to the progress of ecclesiastical judicature. There were two subjects of jurisdiction which the spiritual court gradually drew to itself and endeavoured to appropriate : these were

(a) Had always been so, as the charter of Henry I. admits, of which the author was not aware, *vide ante*.

(b) Not so at all. Quite the contrary. There was the fallacy. The baronies were held on secular tenure, which was feudal ; the bishoprics were held on spiritual tenure, which was *not* feudal. Thus Littleton says—"They who hold in frank-almoigne shall do no fealty to their lord, because the very words *exclude the lord* to have any earthly or temporal service, but to have only divine and spiritual service," (c. vi.). Glanville had laid down the same law, under Henry II.

(c) The charter of Henry I. has been already quoted, in which he acknowledges that his claims had been abominable and oppressive exactions. He had kept bishoprics vacant, in order to exact money, or the admission of his own nominees. Of course he cared not about the ceremony ; it was the power of nomination and the right of patronage, which he strove to obtain, for the sake of these exactions.

(d) Thus, then, after all, the position taken by the church has been admitted to have been in substance right ; for at this moment, even in this country, the letter of the law allows of free clerical choice in the election of bishops ; and if the law is only a *dead* letter, it is only because, by reason of the separation from Rome, there is no supreme ecclesiastical authority to whom the clerical choice can be referred, and all authority is virtually merged in the royal prerogative.<sup>1</sup> In the period referred to, however, the papal supremacy was in full force, and was *acknowledged* by the law and constitutions of this country ; and, therefore, as it is at this moment admitted that the election of a bishop ought to be a matter of free clerical choice, it is admitted that it is properly of a spiritual nature, and, therefore, according to the principles of the period in question, the papal claim was right.

*marriages and wills*; which latter led to the cognizance of *legacies*, and the disposal of *intestates' effects*.

Marriage, being a contract dictated and sanctioned by the law of nature, and entitling the parties to certain civil rights, seems to have nothing in it of spiritual cognizance; but the church of Rome having converted it into a sacrament, it became entirely a spiritual contract, and as such fell naturally within the ecclesiastical jurisdiction, very soon after its separation from the secular court; it followed almost of consequence (*a*), that the spiritual court should likewise determine questions of *legitimacy* and *bastardy*.

(*a*) All this is put as if it arose about the same time. "The jurisdiction over matrimonial causes granted to bishops by Christian emperors was a very natural consequence of the religious rites with which marriage was solemnised, and the character of a sacrament, or eminently sacred rite, attributed to that important union" (Mackintosh's *Hist. Eng.*, vol. i. p. 208). The rite of marriage was certainly, as Sir J. Mackintosh says, considered of the most sacred character from the earliest times in this country, for in the Penitential of Theodore it is said, "Presbyter debet messam agere et benedicere ambos, sicut in libro sacramentorum continetur" (*Pen. Theod.* c. xvii. s. 9). At the same time, it is curious that there is in that same Penitential this remarkable provision, "Si mulier discesserit a viro suo, despiciens eum, nolens revertere et reconciliare viro, post v. annos, cum consensu episcopi; ipse aliam accipiat uxorem" (*Ibid.* c. xix. s. 23). There is no doubt, however, that any Roman counsel or canonist would condemn this as unsound; and it is well known that the whole spirit of the Roman system is, and always was, to treat marriage as sacred, and indeed sacramental; and the union as indissoluble. This being so, it was surely very natural that it should be deemed of ecclesiastical cognizance.

It is to be observed that in the *Mirror of Justice* marriage is treated as a contract, but one perpetual (c. ii. s. 27), indissoluble (c. iii. s. 5), and of ecclesiastical cognizance. "A contract is a speech between two parties that a thing is to be done, of which there are many kinds, whereof *some are perpetual*, as those of matrimony" (c. ii. s. 27). "And note that matrimony is the lawful order of joining together of a Christian man and woman, by their assents; and as of the deity and humanity of Christ, there is made an *indissoluble* unity, so *was matrimony*, and according to such unity was such coupling found to be; and therefore none can remain in that unity who takes to himself a plurality" (c. iii. s. 5). It is added that bigamy is triable in the lay court; but if the jury doubt thereof, in the case of a clerk, then the ordinary is to certify the same as in the case of matrimony, when it is denied (*Ibid.*). It is very remarkable that it appears from the Saxon laws, and from this part of the *Mirror* (which is evidently as old as the Saxon time), that priests were allowed to marry, for it is said that a clerk's claim of privilege might be met by showing that he was "bigamous," either by having twice married, or by having married two wives at the same time (*Ibid.*). And it is plainly implied that his *merely having married* would be no offence. And in the Saxon laws there appears no prohibition of clerical marriages; the language of the Saxon canons on the subject rather imply the legality of such marriages, for it is put rather as a matter of continence becoming to the sacred state, than of utter disability to contract marriage, "Lex continentia est altaris ministris quæ episcopis aut presbyteris, qui cum essent laici, licite uxores ducere et filios procreare potuerunt, sed cum ad prædictos gradus pervenerint, cepit eis non licere quod licuit. Unde et de carnali fit spirituale connubium. Oportet eos nec demittere uxores, et quasi non habeant sic habere, quo salva sit charitas connubiorum et cesset operatio nuptiarum" (*Capit. Theod., Ang.-Sax. Laws*, v. ii. p. 74). In the canons indeed it was laid down that if a priest married, he should forfeit his order, "Si presbyter vel diaconus uxorem duxerit, perdat ordinem suum; et si postea fornicati fuerunt, non solum ordine priventur, sed etiam jejurent juxta sententiam episcopi" (*Pen. Egb. lib. iii. c. 1; Ang.-Sax. Laws*, v. ii. p. 197); but this appears to imply that the marriage was valid, or why should it be a deprivation of the order? and the prohibition of intercourse would be mere penitential discipline. In the *Institutes of Polity* it is said that marriage is not allowed to the clergy (*Ibid.* p. 335); but then afterwards it is said that a priest's wife is a snare (*Ibid.*, p. 337). In the Saxon ecclesiastical laws there are repeated declarations that the clergy ought not to

Cases of wills and intestacy, as they were, in their nature, less allied to the spiritual function, did not entirely submit to the ecclesiastial jurisdiction. It appears from Glanville, that in the reign of Henry II. the jurisdiction of personal legacies was in the temporal courts.<sup>1</sup> But notwithstanding this, if there was a question in the temporal court, whether a testament was a true one or not; whether it was duly made, or whether the thing demanded was really bequeathed; such plea was to be heard and determined by the court christian; because, says our author, *all pleas upon testaments are properly cognizable before the ecclesiastical judge.*<sup>2</sup> Thus, the validity of a testament, or the bequest of a legacy, was to be certified by the spiritual court: nevertheless, as in cases of *bastardy* the court christian did nothing more than answer the mere question, whether bastard or not, and the consequence of *descent* and title was left to be determined at common law; so were the consequences of a testament, as the recovery and payment of legacies, to be heard and determined in the temporal courts.

By the manner in which Glanville speaks of the *probate* of wills, it seems as if that course of authenticating wills had been long in use. The beginning, or steps, by which this innovation established itself, it is not easy to trace (*a*): it lies buried in that obscurity which involves not only the origin of our municipal customs, but the encroachments gradually made upon them by the civil and canon law.

When the ecclesiastical court had once the probate of wills, it appeared no very great enlargement of jurisdiction to add the power of enforcing the execution of them, in payment of legacies. But there are no testimonies of those times that warrant us to conclude, that this had generally obtained before the reign of Henry III.<sup>3</sup>

It seems doubtful, whether the mode used by the Saxons for the distribution of the estates of *intestates* continued during the whole of this period. A law of Henry I. says, that upon a person dying intestate, those who were entitled to succeed should divide his

marry (*Can. Eccl. Laws*, c. 1; *Ang.-Sax. Laws*, v. i. p. 365); but it is doubtful whether by the secular law the marriages were illegal and void. It was undoubtedly considered indecent, and a cause of deprivation. But the *Mirror* appears to imply that a clerk might be married legally.

(*a*) On the contrary, it is perfectly easy, when reference is made to the Roman law, which had long ago provided a regular mode of authenticating wills, doubtless established in this country during their occupation, and virtually the same as that found adopted here; the courts of the bishops being substituted as the places of registry, for the obvious reason that in those days ecclesiastics were the only persons who could read and write. The existence of a custom in some manors for the lord to have the registry is easily explained, either by the supposition that the manor at one time belonged to ecclesiastics, or that the lord had the exceptional endowment of being able to read and write, and so acquired this privilege. In some of our most ancient cities, as York and London, there are customs as to wills, probably as old as the Romans.

<sup>1</sup> Lib. 7, c. 6, 7.

<sup>2</sup> *Ibid.*

<sup>3</sup> Seld. Works, vol. iii. 1672.

effects *pro animâ ejus* (a). This is the first mention in our law of a disposition of an intestate's effects for the benefit of his soul; but there is no mention of the control or intermeddling of the bishop, either in this law, or, even later than this, in Glanville; although he expressly mentions the jurisdiction of the church as to testaments.

In king John's charter it was expressly provided, that if any freeman died intestate, his chattels should be disposed of by the hands of his next of kin *per visum ecclesiæ*, by the advice and direction of the ordinary, saving to all creditors their debts (b). This clause, it is said, was word for word in the charter 9 Hen. III. and is to be seen in several manuscripts of it;<sup>1</sup> but being left out of the exemplification of this charter on the roll 25 Ed. I., from which is copied the *Magna Charta* in our statute books, it is not now found there. The provision was probably inserted by the contrivance of the bishops, who, with Pandolfo, the pope's nuncio, were with John at Runnymede (c). There was not wanting colour for a provision like this; for as the statute of Henry I. before alluded to, had expressly said, that the distribution was to be *pro animâ intestati*, the bishops seemed, by their holy function, to be best qualified to see this office performed with fidelity. Hence it was that, in after-times, this power was delegated by the ordinary to the next of kin, in letters or otherwise; an authority grounded upon these words of the charter, *per visum ecclesiæ*;<sup>2</sup> though there are no documents that assure us this law was put in force during the reign of king John.

In the reign of Stephen the clergy began to draw into the

(a) There was no such law; and if there had been, it could not have been carried out consistently with canon law, which requires that the obligations of justice should first be satisfied before those of piety. The "law of Henry" was the *charter* of that king, recognising and promising to observe the law of the land settled long before the Conquest, and recognised in the laws of Canute, that the effects of an estate should, in certain proportions, be *divided among his relations*" (*Laws of Canute*, s. 73). This meaning, of course, his *available* effects, after payment of debts. "*Si quis preventus, pecuniam suam non dederit nec dare disposuerit, uxor sua, sive liberi eam pro anima ejus dividant, sicut eis melius visum fuerit*" (*Leges Hen. Prim.*, c. i. p. 7). That is, *divide* his effects according to what in *their* judgment would be right and proper, and for the benefit of his soul; and according to canon law and common sense this would imply that they, his nearest relations, should have the reasonable share the law allowed them. And no one will doubt that they took proper care of their own interest. Then the *charter* of John conceded, in pursuance of the charter of Henry, and in order to secure to the relatives their due share of the effects: "*Si aliquis liber homo intestatus decesserit, catalla sua per manus propinquorum parentum et amicorum suorum, per visum ecclesiæ, distribuuntur: salvis unicuique debitis quæ defunctus ei debebat*" (*Charter of John*, c. 27). That is to say, that the effects, after payment of debts, should be *distributed according to law*, that law being, that the greater part, as Glanville states, should be distributed among the relatives, and the residue be applicable for the benefit of the soul of the deceased, according to the ideas and the belief of that age; but this, *after* payment of just debts.

(b) Here, again, the charter was *not* so. It was that the effects should be *distributed among the relatives as provided by law, vide supra*.

(c) A provision for distribution of the effects according to law, *vide supra*.

<sup>1</sup> Seld. Works, vol. iii. 1676.

<sup>2</sup> *Ibid.* 1679.

spiritual court the trial of persons *pro læsione fidei*, that is, for breach of faith in civil contracts. By means of this they took cognizance of many matters of contract which belonged properly to the temporal court. This was the boldest stretch which that tribunal ever made to extend its authority, and would, in time, have drawn within its jurisdiction most of the transactions of mankind. The pretence on which they founded this claim was probably this: that oaths and faith solemnly plighted being of a religious nature, the breach of them more properly belonged to the spiritual than to the lay tribunal.

The circumstances of the times tended very much to encourage the clergy in their scheme of opposition to the secular power. The provision for the clergy was in those days very precarious, and left them at the mercy of their patrons. Being, in general, from their function, considered as a sacred body of people, when oppressed and ill-treated by potent lords, they drew the compassion of many, and particularly the support of their bishops; who, in their turn, receiving as little favour from kings, were continually increasing their store of merit with the sovereign pontiff by the many struggles they engaged in on their own account, and on account of their inferior brethren. The pope, no ungrateful sovereign, always distinguished his zeal in supporting his bishops, as they did in supporting the lower clergy; till the several orders of ecclesiastics, united in a common cause, and sharpened against the laity by long contention, encouraged each other, by every motive of defence and aggrandisement, to contribute in their stations to promote the power of the church. The pope having made use of the bishops to gain and govern the clergy, united all their powers to establish a dominion over the laity; and no occasion was let pass in which any of them could snatch an advantage (a).

Henry I. being seated on the throne by a doubtful title, thought it prudent to gain the clerical part of his subjects by some concessions (b). Stephen, who owed his authority entirely to them,

(a) All this is mere general assertion, not founded upon any authority, nor supported by any, and the value of it may be estimated from the degree of verity to be found in the next statement.

(b) So far from it, that as he himself acknowledged, there had been great oppressions and exactions, and he only promised not to continue them, "*Quia regnum Anglia oppressum erat, injustis exactionibus; ego sanctam Dei ecclesiam liberam facio, ita quod nec vendam nec ad firmam ponam; nec, mortuo archiepiscopo, sive episcopo aliquid aliquam de dominio ecclesiæ donec successor in eam ingrediat. Et omnes malos consuetudines qualis regnum Anglia opprimebantur, inde aufero.*" (*Leges Henrici Primi*, 1). But how far he kept his promise, let contemporary history tell. When Rufus died, says William of Malmesbury, three bishoprics were in his hands; in a few years Henry had *five*. And when after the controversy about investiture he yielded, so far from acting upon considerations of policy, the chronicler states that he had held out mainly in consequence of the persuasions of his nobles, who, of course, were desirous of prolonging the reign of ravage and rapine. Upon the relinquishment by the king of his unfounded claim, no less than five bishops were consecrated, whose sees had been kept vacant in order to enable the king to plunder their temporalities (*William of Malmesbury*, b. ii., A.D. 1107).

went further (a). By these means they acquired such confirmed strength and habitual reverence from the people, that notwithstanding all the power of Henry II., and the spirit with which he asserted his sovereignty and independence, the contest he had with Becket tended to an issue directly contrary to that which he had promised himself; so that, after some concessions and connivance, to which he submitted in fits of repentance, his reign ended in a firm establishment of the clergy in most of their extraordinary claims of privilege and jurisdiction.

The contest that Henry II. had with Becket concerning the limits of ecclesiastical power, fills up a great part of that king's reign. To give weight to his side of the contest, and, instead of debating, to effect a clear decision, Henry procured an act of the legislature formally enacting the principal points of controversy for which he contended (b). This was the famous *Constitutions of Clarendon*.

(a) Went much further in exaction and oppression. Sir J. Mackintosh terms him a captain of banditti (*Hist. Eng.*). He plundered the church without mercy.

(b) The author here, as Henry had done, begged the whole question, and, like the king, would decide the case without debating it. It is impossible to form a judgment upon the merits of this most memorable controversy, merely by looking at these Constitutions, without attending to the previous events. This would be necessary even if the Constitutions could really be considered as in the nature of a statute or an act of parliament. For though they would of course determine the question as a matter of law, that would still leave the question open as a matter of legal history, what was their real nature and origin, and what their real meaning, and whether they were an alteration of the law or not. But whether they were indeed of the nature of a statute, or were rather a mere device of a despotic monarch to give the colour of authority to his aggressive tyranny, is a question which itself must depend upon all the surrounding facts and circumstances of the case. And the first thing to carry clearly and carefully in mind is this, as in any other legal controversy, what was the state of the law when the controversy arose? The next thing is to have a clear knowledge of the facts, so far as they throw any light upon the controversy. Now, as to the law, the reader has the means of forming a judgment by referring back to those copious quotations from the Saxon laws which have already been given, and which were all confirmed by the Conqueror and his successor, Henry I., especially as to the rights and liberties of the church. This is of the more importance, because the archbishop was of Saxon origin, and would no doubt have a strong attachment to the laws of his Saxon ancestors. By those laws, in a legal point of view, he must be judged. Mackintosh, with characteristic candour, appears to allow that the only way to judge fairly of Becket is to put ourselves as much as possible in the position in which he was at the time of these events, and admit that the archbishop sincerely supposed and believed that he was in the right as to the law of the land at the time. It is to be observed that Becket, before he was archbishop, had been eight years chancellor, and that he had also acted for years as justiciary (Foss's *Lives of Judges*, vol. i. p. 198), and that under his auspices the administration of justice had greatly improved (*Ibid*). It is manifest that such a man must have known the Saxon laws, and the charters confirming them, and of course was well aware of what had taken place in the reign of Henry I., when the rights of the church as to the episcopate were established. That being so, the probability is that he would know what the law was; and, at all events, it is manifest that to enable us to judge of his conduct, the first great question is *what* the law was? This the reader can judge for himself from the citations already given; and it need only be said that it is conceived they show that the law was clear that the church should be free—that is, free in her elections, and free in her sentences, and free from all secular jurisdiction. Controversies had, however, arisen between the crown and the church in the reign of Henry I. as to the right of the crown to give investiture of bishoprics, on the pretence that they were baronies, and so held of the crown, like feudal benefices. The effect of

At a great council held at Clarendon, A.D. 1164, in the 10th year of his reign a code of laws was brought forward by the king, under the title of *the ancient customs of the realm*; and as Becket had solemnly promised he would observe

Constitutions  
of Clarendon.

this would have been to give the crown virtually the control over the episcopate, as it could exercise a *veto* upon any election by refusing investiture, and thus keep sees vacant for any time. And as the crown claimed and exercised the right of custody of vacant sees, and received and enjoyed all the temporalities, it is manifest that there was the strongest motive to abuse the power thus claimed; nor is there any doubt that, as a fact in history, it was so abused. After a great struggle, in the reign of Henry I. the claim of investiture was relinquished by the crown, but it still claimed the right of custody of vacant sees. What that law was has been shown, and the reader can refer back to the statement of it, and see how far it recognised the canon law and the rights of the church. It is most natural to refer also to the terms of the charters, as to the church, and especially as to its bishoprics. The charter of Henry I. acknowledged that the church and the country had been oppressed by most grievous extortions, especially in the selling of bishoprics or benefices: "*Quia regnum oppressum erat injustis exactionibus, ego sanctam ecclesiam liberam faciam ita quod nec vendam, nec ad firmam ponam, nec mortuo archiepiscopo sive episcopo, vel abbate, aliquid accepiam de dominio ecclesiæ, donec successor in eam ingreditur*" (c. 1). This was a confession that the Conqueror and his sons had interfered with the liberties of the church, and had made the vacancies of sees the occasion of enormous oppressions and exactions. It was also a distinct acknowledgment that these practices were illegal. Thus the liberty of the church meant, and that is included, liberty to proceed to give elections of bishops, so as to put an end to vacancies in the sees, appears from subsequent charters. That of Stephen declared, "I promise to do nothing in the church or in ecclesiastical affairs simonically, nor will I permit it to be done. I defend and confirm that the power, possessions, and dignities of ecclesiastical persons, and all clerks, and the distribution of their goods, shall be in the hands of the bishops. And I grant and establish that the dignities of churches, confirmed by this privilege and the ancient customs, shall remain inviolable" (See Blackstone's *Charters*). Then Stephen granted a further charter of all those liberties and good laws and customs which Henry I. had granted, and which were held in the time of king Edward. Then Henry II. himself had granted a charter, which was in these terms: "I have granted, and restored, and confirmed to the church all the customs which king Henry I. gave and granted to them, and abolished all *evil customs* which he abolished, and I will that the church do have and hold all usages, liberties, and free customs as freely and fully as he granted to them," so that there had been under the Conqueror and his successors certain usages introduced contrary to the ancient usages, and contrary to the law. And closely connected with, and indeed disclosed in the charters, are the facts of history to which they had reference, that the Norman sovereigns had been in the habit of *keeping sees vacant in order to enjoy their temporalities*, and to extort money for the liberty to come to an election, or even assent to the nomination of a corrupt and vicious prelate, who would be willing to collude with the king in the plunder and corruption of his diocese. It is an undoubted fact that Henry and his predecessors thus held sees vacant—sometimes as many as five or six at a time—and plundered them meanwhile (Lingard's *Eng. Hist.*, v. i. c. 3), and in the intervals, valuable possessions of the church were alienated to royal favourites. It appears, however, that so soon as A'Becket was made archbishop, he showed himself resolute in recovering the lost possessions of the church, and that he at once claimed a barony belonging to his see, which had for some time been in the possession of one of the king's most powerful and favoured vassals. If this claim had not been warranted by law, it could and would have been contested, and as it was not, it may be presumed that it was valid. The archbishop also presented to a living (of Bynsford) belonging to a manor which, beyond all doubt, belonged to his see; the fact is admitted by Hume (*Hist. Eng.*, v. i. c. 8, p. 34), and it appears from the record of the great suit by the archbishop of Canterbury in the time of the Conqueror, to which allusion has been made more than once (*vide ante*, p. 81). One of the king's military tenants who had possession of the manor forcibly expelled the presentee, pretending to be patron. Whether he was so or not, however, is not material, for of course the forcible ejection of the archbishop's nominee was not a



what were really such, the king procured the principal propositions in dispute to be enacted, and declared by the council under that denomination. Nothing will enable us to judge so well of the pre-

proper way of deciding a question of church patronage, and was, moreover, a high contempt of the head of his church. The archbishop accordingly excommunicated him: the king sent orders to the archbishop to take the sentence off. The archbishop refused, replying that it was not for the king to prescribe whom he should or should not excommunicate. No one who has given the least attention to the laws of that time can doubt that the archbishop was right. The refusal, however, it is clear from the result, greatly offended the monarch, and he soon afterwards seized upon another ground of dispute, in which he was equally in the wrong; and in which his object—as his subsequent conduct showed—was to acquire greater power over the clergy. In the time of the archbishop's predecessor, one of the priests of his province had been accused of homicide, and tried before his bishop, according to the law still in force. One of the king's justices in circuit took offence, the priest being in court, to denounce him as a murderer: the priest uttered expressions of anger and contempt, for which he was tried, and severely punished. The king, however, then insisted that henceforth the clergy should, after they had been first degraded by the sentence of the spiritual judge, be afterwards delivered over to the lay tribunal to be tried according to the secular law. This, it is plain, would be an alteration of the law, and the king's language, as Lingard observes, in making it, showed that he knew it was so—"Peto et volo ut tuo, Domine Cantuariensis, et co-episcoporum tuorum consilio." And it was obvious that it would have enabled him easily—by means of servile judges—to get rid of an obnoxious prelate. The prelates objected, on the double ground that it would be punishing a man twice for the same offence, and that it would be placing the English clergy in a different position from that which the clergy occupied all over Europe. It was then that the king demanded of them if they would observe "the ancient customs of the realm." This, as Lingard observes, was a captious question, for it left all open what were the "customs" intended; and it might be that what the king intended were the evil customs as to the church, which the Conqueror and his sons had introduced, and which Henry I. had renounced, and there is abundant reason to believe that this was so, from the very nature of the demand, from the circumstances under which it was made, and from what soon afterwards followed. The demand had no reference to the immediate subject of dispute, the jurisdiction over clerks, for it was not pretended that there had been any custom upon that matter at all in favour of the claim to lay jurisdiction. There had, however, been customs—evil customs though they had been admitted to be—which had for some time been in existence, though again and again renounced, and these customs were of immense practical importance to the king; while the jurisdiction over clerks was probably a matter of little concern to him. For the effect of these customs, it will have been seen, was, that the king kept sees vacant for the sake of plundering the temporalities, and also of enforcing the admission of corrupt and servile prelates who might connive at his doing so. The controversy with the archbishop, be it observed, had begun with his endeavour to recover the temporalities of his see. The king would, no doubt, foresee that such a man was likely to prove an independent and determined antagonist in any plans of church-spoliation he might contemplate, and therefore it would be of the most vital importance to the king to commit the prelates, and especially the archbishop, to some vague admission of customs which might appear to cover their encroachment. Moreover, the actual facts and circumstances of the time show that this was really what the king was aiming at, for it appears that he had in his hands, a few years after this, an archbishopric, five bishoprics, and three abbays; and a few years later, no less than seven bishoprics, and an archbishopric, besides several abbays, and had divided the greater part of one of the bishoprics among his knights (Lingard, *Hist. Eng.*, v. ii. c. 3). This was exactly the course the Conqueror and his sons had pursued, and was the very course Henry I. had renounced; it was grossly illegal, yet it might, perhaps with some colour, be pretended that it was a custom. There can be no doubt, therefore, that it was this the king was aiming at, and it affords an explanation of his sudden demand on the prelates for a recognition of his customs. The prelates replied that they could only assent, saving the rights of their order; an answer which, of course, foiled the wily monarch. He was enraged, and at last extorted an assent to the customs, and a council was



tensions of the clergy, as a perusal of these Constitutions; they shall therefore be stated at length. They are contained in sixteen articles; ten of which were considered by the see of Rome as so hostile to the rights of the clergy, that pope Alexander in full consistory passed a solemn condemnation on them; the other six he *tolerated not as good, but less evil*. These six articles were the 2d, 6th, 11th, 13th, 14th, and 16th.

The 2d, Churches belonging to the see of our lord the king cannot be given away in perpetuity, without the consent and grant of the king. 6th, Laymen ought not to be accused, unless by certain and legal accusers and witnesses, in presence of the bishop, so as that the archdeacon may not lose his right, nor anything which should thereby accrue to him; and if the offending persons be such as none will or dare accuse them, the sheriff, being thereto required by the bishop, shall swear twelve lawful men of the vicinage or town before the bishop, to declare the truth according to their conscience. 11th, Archbishops, bishops, and all dignified clergymen,<sup>1</sup> who hold of the king and chief, have their possessions from the king as a barony, and answer thereupon to the king's justices and officers, and follow and perform all royal customs and rights, and, like other barons, ought to be present at the trials of the king's court, with the barons, till the judgment proceeds to loss of members, or death. 13th, If any nobleman of the realm shall forcibly

summoned at Clarendon, at which these customs were drawn up, and one of them was, *that the custody of every vacant bishopric, archbishopric, or abbey should be given, and its revenues, during the occupancy, paid to the king, and that the election ought to be by the king's writ; the effect of which was to establish the vicious and pernicious practice renounced by Henry I., and to enable the king to keep sees vacant as long as he pleased, thus receiving the revenues all the time, which of course would be the strongest inducement to prolong the vacancy.* Then it was claimed that the proceedings of the clergymen should be in the king's court, an undoubted innovation. So of the next, that there should be no excommunication of any of the king's principal tenants or officers without application to him, which, of course, deprived the church of its only weapon of defence against the greatest plunderers of the age, and was also an undoubted innovation on the ancient law, which left the bishops full power of excommunication. Two other articles were directed against appeals to the see of Rome, and another gave the king's courts jurisdiction in various ecclesiastical matters, advowsons, &c. The archbishops, not at first apparently understanding them, signed the Constitutions; but the pope disallowed most of them, and the archbishop then resisted. It may be of interest to present the archbishop's view of the question, conveyed in a letter to the king: "*Ecclesia Dei in duobus constat ordinibus, clero et populo. In clero sunt apostoli, apostoliciviri; episcopi, et ceteri doctores ecclesiæ, quibus cummissa est cura et regnum ipsius ecclesiæ: qui tractare habent negotia ecclesiastica: ut totum reducatur ad salutem animarum. In populo sunt reges, principes, duces, comites, et aliæ potestates, qui sæcularia habent tractare negotia, ut totam reducant ad pacem et unitatem ecclesiæ. Et quia certum est reges potestatem suam accipere ab ecclesia, non ipsum ab illis, a Christo, ut salvâ pace vestâ loquar non habetis episcopis præcipere, absolvere aliquem, vel excommunicare, trahere clericos ad sæcularia examina, judicare de ecclesiis ne decimis, interdicere episcopis ne tractent causas de transgressione fidei, vel iuramenta, et multa in hunc modum, quæ scripta, inter consuetudines vestras quas dicitis avitus" (*Epi. St Thomæ Const. Ep. lib. i., Ep. 6*). This, too, accords with the law as afterwards laid down by Bracton.*

<sup>1</sup> So *universæ personæ* is construed by Lord Littleton in his Hen. II. vol. iv. 370.

resist the archbishop, bishop, or archdeacon, in doing justice upon him or his, the king ought to bring them to justice; and if any shall forcibly resist the king in his judicature, the archbishops, bishops, and archdeacons ought to bring him to justice, that he may make satisfaction to our lord the king. 14th, The chattels of those who are under forfeiture to the king, ought not to be detained in any church or churchyard against the king's justice, because they belong to the king, whether they are found within churches, or without. 16th, The sons of villeins ought not to be ordained without the consent of their lords, in whose lands they are known to have been born.

Thus was the pope pleased to tolerate such of these articles as either did not at all affect the clerical state, or rather contributed to aid and support it; and were thrown in, probably, to qualify and temper those which were evidently hostile to the ecclesiastical sovereignty. The ten which were condemned by the pope, were as follow:

The 1st, If any dispute shall arise concerning the advowson and presentation of churches between laymen, or between ecclesiastics and laymen, or between ecclesiastics, let it be tried and determined in the court of our lord the king. 3d, Ecclesiastics charged and accused of any matter, and being summoned by the king's justice, shall come into his court to answer there concerning that which it shall appear to the king's court is cognizable there; and shall answer in the ecclesiastical court concerning that which it shall appear is cognizable there; so that the king's justice shall send to the court of holy church, to see in what manner the cause shall be tried there; and if an ecclesiastic shall be convicted, or confess his crime, the church ought not any longer to give him protection. 4th, It is unlawful for archbishops, bishops, or any dignified clergymen of the realm, to go out of the realm without the king's licence; and if they go, they shall, if it so please the king, give security that they will not, either in going, staying, or returning, procure any evil or damage to the king or kingdom. 5th, Persons excommunicated ought not to give any security by way of deposit, nor take any oath, but only find gage and pledge to stand to the judgment of the church, in order to absolution. 7th, No tenant *in capite* of the king, nor any of the officers of his household, or of his demesne, shall be excommunicated; nor shall the lands of any of them be put under an interdict, unless application shall first have been made to our lord the king, if he be in the kingdom, and if not, to his justice, that he may do right concerning such person; and in such manner, as that which shall belong to the king's court shall be there determined, and what shall belong to the ecclesiastical court shall be sent thither to be there determined. 8th, Concerning appeals, if any shall arise, they ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop: and if the archbishop shall fail in doing justice, the cause shall at last be brought

to our lord the king, that, by his precept, the dispute may be determined in the archbishop's court; so that it ought not to proceed any further without the king's consent. 9th, If there shall arise any dispute between an ecclesiastic and a layman, or between a layman and an ecclesiastic, about any tenement which the ecclesiastic pretends to hold *in eleemosynâ*, and the layman pretends to be a lay fee, it shall be determined by the judgment of the king's chief justice, upon a recognition of twelve lawful men *utrûm tene-mentum sit pertinens ad eleemosynam, sive ad fœdum laicum*. And if it be found to be *in eleemosynâ*, then it shall be pleaded in the ecclesiastical court; but if a lay fee, then in the king's court, unless both parties claim to hold of the same bishop or baron: and if they do, then the plea shall be in his court; provided, that by such recognition, the party who was first seised shall not lose his seisin till the plea has been finally determined. 10th, Whosoever is of any city, or castle, or borough, or demesne manor of our lord the king, if he shall be cited by the archdeacon or bishop for any offence, and shall refuse to answer to such citation, may be put under an interdict; but he ought not to be excommunicated till the king's chief officer of the town be applied to, that he may, by due course of law, compel him to answer accordingly; and if the king's officer shall fail therein, such officer shall be *in misericordiâ regis*; and then the bishop may compel the person accused by ecclesiastical justice. 12th, Pleas of debt, *quæ fide interpositâ debentur, vel absque interpositione fidei*, whether due by faith solemnly pledged, or without faith so pledged, belong to the king's judicature. 15th, When an archbishopric, or bishopric, or abbey, or priory of royal foundation, shall be vacant, it ought to be in the hands of the king, and he shall receive all the rents and issues thereof, as of his demesne. And when such church is to be filled, the king ought to send for the principal clergy thereof, and the election ought to be made in the king's chapel, with the king's assent, and the advice of such of the prelates of the kingdom as he shall call for that purpose;<sup>1</sup> and the person elect shall there do homage and fealty to the king as his liege lord, of life, limb, and worldly honour (saving his order), before he be consecrated.<sup>2</sup>

These Constitutions were calculated to give a rational limitation to the secular and ecclesiastical judicature; and furnished a basis on which these separate jurisdictions might have been founded, without any inconvenience to the nation, or diminution of the temporal authority; and they were with that view confirmed, A.D. 1176, at a council held at Northampton (a). But the king, over-

(a) As to this, the author was in error. Before the council, the king had written to the pope, promising to withdraw any customs hostile to the liberties of his clergy,

<sup>1</sup> *Debet fieri electio assensu domini regis, et consilio personarum regni quas ad hoc faciendum vocaverit.*

<sup>2</sup> *Vide Wilk. Ang. Sax. Leg. p. 321, and also in Litt. Hen. II. vol. iv. 414, a copy of these Constitutions from the Cottonian manuscript of Becket's Life and Epistles, which is probably the most ancient and correct copy of them.*

come with shame for the murder of Becket, with which he was charged, and struck with a panic of superstition, gave way to the torrent, and endeavoured to reconcile himself to the holy see by an

and to allow freedom of canonical election (*Hoved.*, 302 ; *Ep. S. Tho.*, ii. 119, 122, 289). At the council of Northampton, the four points above mentioned were granted or conceded to the church as declaratory enactments, but nothing is said as to the confirmation of the constitutions of Clarendon, which would have been grossly inconsistent with the king's promise of withdrawal, made just before. It is, indeed, stated by Gervase that the *assize* of Clarendon was ordered to be enforced, but that was quite different from the *constitutions* of Clarendon; it was the code of instructions to the itinerant justices, and is given by Hoveden (413) in his account of the council of Northampton, and is quoted by our author towards the end of the chapter. (The council of Northampton was in 1171). On the other hand, it does not appear that at this council the constitutions of Clarendon were expressly repealed, and Dr Lingard says of the previous interval which had elapsed: "During the interval, the constitutions of Clarendon, though still unrepealed, were not enforced" (*Hist. Eng.*, v. ii. p. 97). In the absence of any express repeal, they would remain, and their force and effect would depend either upon their original validity, or upon their subsequent adoption into the customary or unwritten law of the realm. As to the first, it seems certain, from the accounts of all historians, that coercion, by bodily terror, was used by the king upon the prelates, and that is quite enough to destroy the statutory authority of these constitutions. But it is not so clear that a great deal of them were not subsequently, by actual use and adoption, incorporated in the customary or unwritten law of the realm. For the present, it seems sufficient to point out that there was *not* any confirmation at the council of Northampton. One of the most important points in our legal history, upon which, it will be observed, our author throws but little light, is, whether, or how far, these celebrated constitutions are to be regarded as law. Of course, if they really were freely agreed to by king, by lords, and by prelates—i.e., by a majority of them, present at a lawful council or assembly, lawfully convened by the sovereign for the purpose of legislation, and freely and really exercising their functions as legislators, they would substantially be statutory enactments; but if, on the contrary, the "council" was only an assembly of barons, under the influence of the king, to which the prelates were compulsorily called, not to consider freely, as legislators, but to be coerced to consent to ordinances predetermined, and forced upon them by the royal power, there would be nothing legislative in them; they would be the mere edicts of a tyrant. That threats and coercion were used, all historians agree, and therefore it seems idle to treat these constitutions as "statutes," in the proper sense of the term; and the very fact that the king seems to have sought a confirmation of some of them at the statute of Northampton shows his consciousness that they were not so, for, if already laws, or legal statutes, they would require no confirmation, added to which, it is stated by the author, in accordance with all histories, that the king at all events professed to withdraw them, which, again, he could not do if they were legal statutes. On the other hand, it is clear that although, if they were not legal statutes strictly, they would not require to be repealed, since they had no legal existence; it would be natural, and practically necessary, since the king had *said* they were statutes, that he should publicly withdraw them. It should seem that, in the absence either of any express confirmation, or any express adoption at the council of Northampton, they remained unrepealed and unconfirmed; and therefore that (their original invalidity being clear) their actual validity would depend upon the extent to which they were subsequently adopted by use and custom into the law of the land. And such seems to have been Hale's view, for, having mentioned them as acts of parliament before the time of legal memory, he says: "Of these, as we have no authentic records, but only transcripts in ancient historians, or other books, they obtain at this day no further than as by usage and custom they are, as it were, engrafted into the body of the common law, and made a part thereof" (*Hist. Com. Law*, p. 7). This seems to be the sound conclusion, for another reason, that, if these constitutions were to be taken as statutes of the realm, in full force, there would have been nothing left to enact at the era of the separation from Rome; since their clear effect was to render the king absolute. All appeals to Rome were abolished, save at his will and pleasure, and he would have entirely in his power the whole episcopate of the realm. And the only two really effective modes in which the Roman supremacy could be exercised would be by the

ample concurrence with all its demands; at least he desisted from executing those laws for which he had so many years been contending. It appears, moreover, from a letter which he sent to the

power of appeal and the control over the episcopate. Yet it never occurred to any one in the reign of Henry VIII. that all this had already been done by statute, centuries before. And, on the other hand, we know that, in the meantime, during the whole of that long interval, the Roman See had exercised its appellate jurisdiction, and its control over the episcopate. On the other hand, we also know that, during that long interval, without any other statutory enactment, certain parts of the law were altered, and in accordance with these constitutions of Clarendon. Thus, for instance, clerks became subject to secular jurisdiction, though privilege of clergy remained to our own age. This could not be by the constitutions, for in the council of Northampton, *that* article had been implicitly repealed (*vide ante*) by a contrary enactment. It could, therefore, only have been by usage insensibly growing up, in accordance with the general feeling of the country; and as the administration of justice improved, there would of course be no reason for the maintenance of the privilege, which only rested on the barbarous character of the criminal procedure of that age. It will be observed that Henry II. had also expressly enacted at the council of Northampton that clerks should not be subject to the duel, and we also know that after the reign of John the ordeal became obsolete. After this era it would be natural that the clerical exemption from secular jurisdiction should also die out. That it was the law, however, there can be no doubt, and this may be the most fitting place to present such passages from the *Mirror of Justice* (a work completed after this period) as serve to illustrate what the law was virtually taken to be after this period upon the points in controversy. This will show how far these celebrated constitutions had been actually incorporated by use and adoption into the common law or custom of the realm. First, as to the subject just referred to, exemption of ecclesiastical persons or property from the jurisdiction of the lay tribunals. Treating of exceptions, the *Mirror* says: "One as to the power of the judge, and that may be by reason of the two kinds of jurisdictions, or because the king or his judge hath no power in the cause, as it is of the person of a clerk, by reason of the privileges of the church" (c. iii. s. 3). So, in the next section, of exception of clergy: "For the privilege of clergy—as, if a clerk be ordered in court before a lay judge to answer to an action for a personal mishap, and especially in a case criminal and mortal, plead that he is a clerk, the judge hath no further cognizance of the cause, for the church is so enfranchised that no lay judge can have jurisdiction over a clerk. Nevertheless, to give actions to plaintiffs against accessories in appeals and indictments, it belongeth to the judge to inquire, by the oaths of honest men, in the presence of the clerk, whether he be guilty or not, and if he be guilty, then to be delivered to his ordinary" (*ib.* s. 4). It is, indeed, added in the next section that the privilege might be rebutted by proof that the clerk had forfeited it by what was called "bigamy"—*i. e.*, by marrying a widow, or too many wives, a curious relic of the old Saxon law which allowed priests to enter into marriage; for, although it is explained that in a clerk, who could only marry once, the offence of bigamy was committed as well by marrying twice, or by marrying a widow, as by marrying more women than one, it is implied that there would be no loss of privilege merely by his being married. This seems to refer the passage to the Saxon age, because after the Conquest a stricter discipline was introduced, and priests were not allowed to marry; but then, in that view, it only makes the case stronger and clearer in favour of the archbishop in his great contest with Henry II., because it shows that, from the Saxon times, clerks had been privileged, which, indeed, has already been shown from the Saxon laws. So much as to personal exemptions of clerks from lay jurisdiction. Then, as to ecclesiastical rights, as advowsons, patronage of episcopal bishoprics or benefices, and the like; it is to be observed that in the *Mirror*, in a chapter which mentions Edward I., and therefore was composed or edited long after the period now in question, all the branches or heads of royal rights or jurisdiction being mentioned, there is no mention of bishoprics (c. i. s. 3). And so, in a subsequent section expounding the nature of legal jurisdiction, it is confined to matters of a secular nature (c. iv. s. 3). On the other hand, in the "Treatise of Glanville," written at the end of the reign of Henry II., there is a book upon "ecclesiastical advowsons" (*lib.* iii.) which he treats of as decided in the king's courts. But then this only refers to the right of patronage, and it is stated that if the clerk admitted the claimant to be patron, and claimed to have been

pope by the hand of *Hugo Petrileo*, the legate, that, *notwithstanding the opposition of the greatest and wisest men in his kingdom*, he had, at the intercession of the legate, and out of reverence and devotion to the see of Rome, made the following concessions. That no clerk should, for the future, be brought personally before a secular judge for any crime or transgression<sup>1</sup> whatsoever, except only for offences against the forest laws, or in case of a lay fee for which lay service was due to the king, or to some other secular person. He promised that any person convicted, or making confession before his justice, in the presence of the bishop, or his official, of having knowingly and premeditatedly killed a clerk, should, besides the usual punishment for killing a layman, forfeit all his land of inheritance for ever.<sup>2</sup> He also promised, that clerks should not be compelled to submit to the trial by duel; and moreover, he promised not to retain in his hands vacant bishoprics or abbeys beyond the term of one year, unless from urgent neces-

instituted upon his presentation, and that was denied, it was to be decided before the ecclesiastical judge (c. ix.). And if the clerk named another party as patron, who appeared, and disclaimed, then, again, the suit would cease in the king's court, and be dismissed between the patron and the clerk in the ecclesiastical court. In short, questions as to patronage were deemed to pertain to the king's court: questions as to institution, or presentation, to the ecclesiastical court. In other words, questions between patrons would be tried in the king's court, and questions between patron and clerk in the ecclesiastical court. It is further stated that, in case of vacancy, and default of the patron to present, the presentation fell into the hands of the king. If the party under whom the clerk claimed pressed his claim to the patronage, and was defeated, then in the king's court nothing more could be done in the matter; but the patron who had recovered the right of advowson could proceed against the clerk in the ecclesiastical court before the bishop, with this restriction, that if at the time of presentation the parson presenting was considered to be patron, the clerk should continue to hold. For (says Glanville) upon this subject a statute was passed in the reign of the present king (Henry II.) concerning those clerks who have obtained livings upon the presentation of patrons, or have, in time of war, violently intruded themselves into ecclesiastical advowsons, and, by such statute, it is provided that clerks thus presented should not lose their churches during their lives (*Ibid.* c. x.). Elsewhere it is laid down, "that, according to the custom of the realm, no one is bound to answer in his lord's court concerning his freehold, without the king's precept. But if the plea should be between two clerks concerning a tenement-hold in frankalmoigne of an ecclesiastical fee, or if the tenant, a clerk, hold an ecclesiastical fee in frankalmoigne, whoever may be claimant, the plea concerning the right ought to be in the ecclesiastical court, unless a question should arise whether the fee be ecclesiastical or lay (lib. xiii. c. xxv.), which, it is afterwards said, is to be decided in the king's court (c. x. s. 3). But before the statute of Westminster II., Lord Coke says, "no *juris utrum* lay for one parson against another, because it was, in that case, the right of the church" (2 *Inst.*, 407). Thus, then, it came to this, that questions of right between laymen were decided in the king's courts; questions between laymen and clergymen, or between clergymen on matters ecclesiastical, were tried in the ecclesiastical courts. With regard to the bishoprics, it need hardly be observed that, as the question then would be between the king and the pope, they could not come into the king's courts; and though, according to analogy, those questions would be determinable in the papal courts, yet it is equally obvious that, as the pope could not enforce his decision except by excommunication, the extent to which it was regarded would virtually depend upon the extent to which the king could safely disregard it—i.e., in the opinion of the age.

<sup>1</sup> *De aliquo foris-facto.*

<sup>2</sup> What extraordinary penalty was this, when laymen, at that time, forfeited their lands in cases of felony?

sity, and evident cause of delay, not falsely pretended.<sup>1</sup> It is said,<sup>2</sup> that Henry, by charter, granted to the clergy the cognizance of causes matrimonial; but neither this nor any other of the foregoing concessions were enacted by authority of parliament, during any part of this king's reign; nor did he himself observe them, except in not compelling criminal clerks to appear before a lay judge, as before stipulated, and in exempting them in all cases from the trial by duel. The statutes of Clarendon concerning ecclesiastical matters subsisted unrepealed and confirmed; but were suspended in part by a temporary connivance of the executive power.<sup>3</sup>

The establishment which the clergy gained in this reign was not weakened in those of his successors. Richard I. was redeemed from his captivity by the aid of his subjects; among whom the zeal of the ecclesiastics, who readily converted their plate and other valuables to the ransom of their king, was particularly distinguished. This gave them everything to hope from the king's gratitude; nor were they disappointed in their expectations. The feudal subjection under which John laid his kingdom to the pope, ratified every clerical innovation, and seemed to justify the distinctions before claimed by the churchmen.

In this manner did the influence of the civil and canon law gradually increase; but these laws were not confined to the ecclesiastical courts, where they were professedly the only rules of decision: they, by degrees, interwove themselves into the municipal law, and furnished it with helps towards improving its native stock. The law of personal property was in a great measure borrowed from the imperial, and the rules of the descent of lands wholly from the canon law: to these might be added many other instances of imitation, too long to be enumerated in the present work.

These two laws, as the Norman had before, obtained here by sufferance and long usage. Such parts of them as were fitting and expedient, were quietly permitted to grow into practice; while such as were of an extravagant kind occasioned clamour, were called usurpations, and, as such, were strongly opposed. What was suffered to establish itself, either in the clerical courts, or by mingling with the secular customs, became so far part of the common law of the realm, equally with the Norman; for though of later birth, it had gained its authority by the same title, a length of immemorial prescription.<sup>4</sup>

<sup>1</sup> Wilk. Leg. Ang. Sax. p. 331; Litt. Hist. Hen. II. vol. iv. 265, 296.

<sup>2</sup> Sir Roger Owen MSS. p. 397.

<sup>3</sup> Sir Roger Owen says the king obtained a parliamentary repeal of the constitutions of Clarendon.—MSS. p. 404.

<sup>4</sup> This is all that I thought necessary to state concerning the prevalence of the civil and canon law, and the influence they both had upon the common custom of the realm; and I have heard no complaint, as in the case of feuds, that this part of the work is at all defective; indeed, I should not wonder if some thought even this short sketch too prolix, so much are our studies and opinions directed by fashion. But it seems to me,



It had been a very ancient custom among the Normans, both in their own country and in France, to try titles to land, and other questions, by *duel*. When William had ordained that this martial practice of his own country should be observed here in criminal trials; it became very easy to introduce it into civil ones; and being only used in the *curia regis*, it had not, among the other novelties of that court, as it certainly would have had in the county court, or any other of the ancient tribunals of Saxon original, the appearance of so singular an innovation.

Of trial by  
duel in civil  
questions.

With all its absurdity, this mode of trial was not without some marks of a rational reliance on testimony, and vouchers for the truth of what was in dispute; for it was never awarded without the oath of a credible witness, who would venture his life in the duel for the truth of what he swore. "I am ready," says the party litigant, "to prove it by my freeman John, whom his father on his death-bed enjoined, by the duty he owed him, that if at any time he should hear of a suit for this land, he should hazard himself in a *duel* for it, as for that which his father had *seen and heard*." Thus the champion of the demandant was such a one as might be a fit witness; and on that account the demandant

if the illustration of our ancient law had been the sole object of attention, and not a prepossession in favour of a topic that happened to be in vogue, that the same censure would be at least as applicable in one as in the other case.

A comparison of our law with those two systems of jurisprudence, would, in my mind, be an inquiry of equal curiosity, and much more to the purpose of a history of the English law, than the same process when applied to the so-much-admired systems of foreign feuds. This is sufficiently evinced by the cursory remarks already made respecting these two laws. It further appears by the works of Glanville, Bracton, and other old authors, who certainly wrote the law of their time, and not their own inventions, as has been too often and too inconsiderately said; and it is confirmed by marks of conformity, or imitation, in instances where no suspicion of fabrication was ever entertained.

The civil and canon law seem in a particular manner to be objects of curiosity to an English lawyer; they have long been domesticated in this country; were taught at our universities as a part of a learned education, and the road to academic honours; they have entered into competition with the common law; and, though unsuccessful in the struggle, were still thought worthy to be retained in our ecclesiastical courts, and there became the model by which our national canons and provincial constitutions were framed. These two laws, therefore, stand in a much nearer relation to the common law, than the feudal law of Lombardy, or of any foreign country; none of which can boast any pretensions equal to those above mentioned.

Notwithstanding this close affinity between the civil and canon law and our own, I thought, that to enter into a particular comparison of such parts of those laws as seemed more remarkably to relate to the common law, was an inquiry not strictly within the compass of the present History; and therefore I declined it, for reasons similar to those I have before given with regard to foreign feuds.

I cannot, however, leave this subject without expressing a wish, that the early connexion of our law with the civil and canon law was more fully investigated than it has yet been. The history and present state of those two laws in this country, and of our own national canon law, seems also to have been not yet sufficiently developed. To this it may be answered, that there is at least as great want of curiosity upon this topic as of information; and I am sure I do not pretend to determine which of these is the cause, and which the effect, of the other.

<sup>1</sup> Ariosto, in the true spirit of the old jurisprudence, as well as of chivalry, makes Rinaldo refer to the proof by arms, as equal to if not *stronger* than that by testimony.

*Col testimonio, io vo', che l'arme sieno :  
Che ora, e in ogni tempo, che ti piace,  
Te n'abbiano a far prova piu verace.*

Orl. Fur. cant. 31, stanz. 102.



could never engage in the combat himself: but the other party, who was defendant, or tenant in the suit, might engage either in his own person, or by that of another.

It is difficult to say what matters were, at one time, submitted to this mode of trial (*a*). Perhaps at first all questions of fact might, at the option of the demandant, have been tried by duel. In the reign of Henry II., it was decisive in pleas concerning freehold; in writs of right; in warranty of land, or of goods sold; debts upon mortgage or promise; sureties denying their suretyship; the validity of charters; the manumission of a villein; questions concerning service: all these might have been tried by duel.<sup>1</sup>

Notwithstanding the general bent of this people to admit the propriety of a trial so suitable to their martial genius, there must have been men of gravity and learning amongst them at all times; and persons of that character would always reprobate so ineffectual and cruel a proceeding. Considerations of this kind at last effected a change.

We find in the reign of Henry II. that many questions of fact relating to property, were tried by twelve *liberos et legales* Of trial by jury. *homines juratos*, sworn to speak the truth; who were summoned by the sheriff for that purpose. This tribunal was in some cases, called *assisa*, from *assidere*, as it is said, because they sat together; though it is most probable, and indeed seems intimated by the manner in which Glanville often expresses himself, that it was emphatically so called from the *assisa* (as laws were then termed), by which the application of this trial was, in many instances, ordained. On other occasions this trial was called

(*a*) If the author had read the *Mirror*, he would have found a full exposition of the matter: "There are many modes of proof: sometimes by records; sometimes by battle; sometimes by witnesses." Then as to trial by battle, the proof of felony and other causes is done by combat of two according to the diversities of actions; for as there is a personal action and a real, there is a personal combat and a real; personal in personal actions, real in real actions. And these combats are different in this, that in a personal combat for felony, none can combat for another; but in actions personal and venial, it is lawful for the plaintiffs to make their battles by their bodies, or by loyal witnesses, as in the writ of right real combats—because none can be witness for himself, and no one is bound to discover his real right; and though they make their combats for the plaintiffs by witnesses, the defendants may defend their own right by their own bodies, or the bodies of their freemen. And in appeals none can combat for another; but it is otherwise in real actions. The battle of two men sufficeth to declare the truth, so that victory is holden for truth. Combats are made in many other cases than felonies; for if a man hath done any falsity in deed or in word, whereof he is impeached, and he deny it, it is lawful for one to prove the action, either by jury, or by the body of one witness"—i.e., by battle. And it may be observed here, that trial by jury here plainly means trial by witnesses—as there is no previous mention of jurors otherwise than as witnesses; and at first, jurors were witnesses, whence it followed that if there were no witnesses, there could be no trial by jury; and hence the difficulty arose, to meet which, the trial by battle or by ordeal was resorted to. "And in cases where battle could not be joined, nor was there any witnesses, the people in personal actions were to help themselves by the miracle of God, in this manner; as, if the defendant were a woman, &c. (*Ibid.*)

<sup>1</sup> Glanv. passim.

*jurata*, from the *juratos*, or *juratores*, who composed it. Of the origin of this trial by twelve jurors, and the introduction of it into this country, we shall next inquire.

The trial *per duodecim juratos*, called *nambda*, had obtained among the *Scandinavians* at a very early period; but having gone into disuse, was revived, and more firmly established, by a law of *Reignerus*, surnamed *Lodbrog*, about the year A.D. 820.<sup>1</sup> It was about seventy years after this law, that *Rollo* led his people into *Normandy*, and, among other customs, carried with him this method of trial; it was used there in all causes that were of small importance. When the Normans had transplanted themselves into England, they were desirous of legitimating this, as they did other parts of their jurisprudence; and they endeavoured to substitute it in the place of the Saxon *sectatores*, to which tribunal it bore some show of affinity (*a*).

The earliest mention we find of anything like a *jury*, was in the reign of William the Conqueror, in a cause upon a question of land, where *Gundulph*, bishop of *Rochester*, was a party. The king had referred it to the county, that is, to the *sectatores*, to determine in their county courts, as the course then was, according to the Saxon establishment; and the *sectatores* gave their opinion of the matter. But *Odo*, bishop of *Bayeux*, who presided at the hearing of the cause, not satisfied with their determination, directed, that if they were still confident that they spoke truth, and persisted in the same opinion, they should choose *twelve* from among themselves, who should confirm it upon their *oaths*<sup>2</sup> (*b*).

(*a*) "There are scarcely any authentic materials for its early history. It seems most probably to have arisen from the confluence of several causes. Perhaps the first conception of it may have been suggested by the very simple expedient of referring a cause by the county court to a select committee of their number, who were required to be twelve, for no reason or even cause that has been discovered. In civil cases, the obvious analogy of arbitration might have contributed to the adopting of juries. Judges, unacquainted with, and incapable of a patient inquiry into facts, might find it safer, as it was easier, to trust to a sort of general testimony given by twelve unexceptionable neighbours, on the litigated question. There are many traces in this institution which indicate that jurors must, in some manner, have been regarded in the same light with witnesses. Neighbourhood, for instance, which might be dangerous to the impartiality of a judge, is advantageous to the knowledge of a witness; and it is still a sort of legal theory, that jurors have the dangerous power of finding a verdict from their own knowledge" (Mackintosh's *History of England*, vol. i. p. 273).

(*b*) It has already been seen that the author is entirely in error on this subject, and that before the Norman Conquest, trial by juries—that is, by a number of the freeholders or suitors of the county, sworn from among the rest, to declare the truth according to their knowledge of it—was used both in civil and criminal cases. It may not have been always by twelve jurors, though it appears plainly that juries in criminal cases consisted of twelve in the time of Alfred; and the number twelve is so often mentioned in the Saxon laws, that there is reason to believe that the juries were so constituted both in civil and criminal cases. But it would appear that even in criminal cases it was not a fixed practice to have juries; as in criminal cases there were other modes of trial, and in civil cases the county might or might not have recourse to it. That which the author failed to understand was that the suitors were the judges of the court, and that they used various modes of assisting themselves in

<sup>1</sup> Hick. Thes. Diss. Epist. 38-40.

<sup>2</sup> Text. Roff. apud Hickee, *ut sup*.

It seems as if the bishop had here taken a step which was not in the usual way of proceeding, but which he ventured upon in conformity with the practice of his own country; the general law of England being, that a judicial inquiry concerning a fact should be collected *per omnes comitatûs probos homines* (a). Thus it appears, that in a cause where this same *Odo* was one party, and archbishop *Lanfranc* the other, the king directed *TOTUM comitatum considerare*; that all men of the county, as well French as English, (particularly the latter) that were learned in the law and custom of the realm, should be convened: upon which they all met at *Pinendena*, and there it was determined *AB OMNIBUS illis probis*, and agreed and adjudged *à toto comitatu*. In the reign of William Rufus, in a cause between the monastery of *Croyland* and *Evan Talbois*, in the county court, there is no mention of a jury; and so late as the reign of *Stephen*, in a cause between the monks of Christ-Church, Canterbury, and *Radulph Picot*, it appears from the acts of the court,<sup>1</sup> that it was determined *per judicium TOTIUS COMITATUS*.<sup>2</sup>

This trial by an indefinite number of *sectatores* or *suitors* of court (b) continued for many years after the Conquest: these are the persons meant by the terms *pares curie*, and *judicium parium*, so often found in writings of this period. Successive attempts gradually introduced jurors to the exclusion of the *sectatores* (c);

their determination, among others, trial by jury; the jurors of cases being in those days *not* judges, but witnesses. It followed, that if it happened that no suitors had any knowledge of the matter, there could be no jurors; for jurors were sworn to declare the truth of their own knowledge. Hence, in criminal cases, the resort to the ordeal in the absence of jurors, or compurgators; hence, in civil cases, the care taken to provide jurors by having witnesses for all transactions, who might afterwards be jurors. Hence, also, in cases where, from their nature, there could not be certain personal knowledge, or only from uncertain memory, as in cases of claims of land, resting on past events, at some distance of time; suits in the county court would be determined more by clamour or partisanship, than by evidence or consideration.

(a) And it is one of the most curious instances of the extreme antiquity of judicial forms of expression, and the evidence they afford of ancient usages, that until recently the phrase used as to trial by jury in civil cases (and it still is so in criminal cases), was, that the party put himself upon the country—i.e., the county, or the men of the county. This is a relic of that ancient jurisdiction of the county court, out of which, by a course of change which has been amply described, the trial by jury arose. And when the jury was first used, as the general body of the freeholders, the suitors were the judges, and the jurors were only witnesses; the record would continue to state that the case was determined by the men of the county. The author failed to observe this, and hence draws a totally wrong inference from the fact that the records so state it. As it did so in cases where there are known to have been juries, of course it affords no evidence that juries were not used even where the fact is not known.

(b) Here, again, we observe that the author had fallen into some confusion upon this subject. The suitors did not try the cases, they were the judges, and they resorted to various modes of trial; of which trial by jurors was one—the jurors being any of their own body who had knowledge of the matter, and were sworn to declare the truth about it. Hence trial by jurors did not, as the author supposes, exclude the suitors, and was for ages used at county courts.

(c) Jurors did not exclude the suitors; the suitors were judges, the jurors witnesses.

<sup>1</sup> Bib. Cott. Faustina, A. 3, 11, 31.

<sup>2</sup> Hickee's Thes. Diss. Ep. 36.

and a variety of practice, no doubt, prevailed till the Norman law was thoroughly established.<sup>1</sup> It was not till the reign of Henry II. that the trial by jurors became general; and by that time, the king's itinerant courts, in which there were no *pares curie* (a), had attracted so many of the county causes, that the *sectatores* were rarely called into action.<sup>2</sup>

The sudden progress then made in bringing this trial into common use, must be attributed to the law enacted by that king. As this law has not come down to us, we are ignorant at what part of his reign it was passed, and what was the precise extent of its regulation: we can only collect such intimation as is given us by contemporary authorities, the chief of which is Glanville, who makes frequent allusion to it. It is called by him *assisa*, as all laws then were, and *regalis constitutio*; at other times, *regule quoddam beneficium*, *clementiâ principis de concilio procerum populis indultum*. It seems as if this law ordained, that all questions of *seisin* of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth; and also that in questions of *right* to land, the tenant might elect to have the matter tried by twelve good and lawful knights instead of the duel. It appears that some incidental points in a cause, that were neither questions of mere *right*, nor of *seisin* of land, were tried by a recognition of twelve men; and we find that in all these cases, the proceeding was called *per assisam*, and *per recognitionem*; and the persons composing it were called *juralores*, *jurati*, *recognitores assise*; and collectively *assisa*, and *recognitio*: only the twelve jurors in questions of right were distinguished with the appellation of *magna assisa*; probably because they were *knights*, and were brought together also with more ceremony, being not summoned immediately by the sheriff, as the others were, but elected by four knights, who for that purpose had been before summoned by the sheriff. We are also told, that the law by which these proceedings were directed, had ordained a very heavy penalty on *jurors* who were convicted of having sworn falsely in any of the above instances.<sup>3</sup>

Thus far of one species of this trial by twelve men, which was called *assisa*. It likewise appears, that the oath of twelve jurors

(a) What the author means is, that the suitors as judges were superseded by the king's justices, who still held their courts in the counties, and either in the old county court assemblies, or at special assemblies of the counties, and by the king's commissions. So enduring is custom, and so closely did the people cling to the idea that the body of the freeholders were judges, that it was not until the reign of Richard II. they were actually excluded from the bench where the king's justices sat.

<sup>1</sup> The following law of Henry I. seem to be in support of the ancient usage. *Unusquisque PER PARES SUOS judicandus est, et ejusdem provincie; PEREGRINA vero judicia modis omnibus submovemus.* Leg. 31.

<sup>2</sup> Persons of a new character, under the name of *secta*, and *sectatores*, in a subsequent period, made a necessary part of most actions brought in the king's courts, as will be seen hereafter.

<sup>3</sup> Glanv. lib. 13, c. 1; lib. 2, c. 7, 19.

was resorted to in other instances than those provided for by this famous law of Henry II. and then this proceeding was said to be *per juratam patrice, or vicineti, per inquisitionem, per juramentum legalium hominum*. This proceeding by jury was no other than that which we before mentioned to have gained ground by usage and custom. This was sometimes used in questions of property; but it should seem, more frequently in matters of a criminal nature.

The earliest mention of a trial by jury, that bears a near resemblance to that which this proceeding became in after times, is in the Constitutions of Clarendon, before spoken of. It is there directed, that, should nobody appear to accuse an offender before the archdeacon, then the sheriff, at the request of the bishop, *faciet jurare duodecim legales homines de vicineto, seu de villâ quod inde veritatem secundum conscientiam suam manifestabunt*.<sup>1</sup> The first notice of any *recognition*, or *assise*, is likewise in these Constitutions; where it is directed, that, should a question arise, whether land was lay or ecclesiastical property, *recognitione duodecim legalium hominum, per capitalis justitiæ considerationem, terminabitur, utrûm, &c.*;<sup>2</sup> this was A.D. 1164. Again, in the statute of Northampton, A.D. 1176 (which is said to be a republication of some statutes made at Clarendon, perhaps at the same time the before-mentioned provisions were made about ecclesiastical matters), the justices are directed, in case a lord should deny to the heir the seisin of his deceased ancestor, *faciant inde fieri recognitionem per duodecim legales homines, qualem seisinam defunctus inde habuit die quâ fuit vivus et mortuus*; and also *faciant fieri recognitionem de disseisinis factis super assisam, tempore quo the king came into England, after the peace made between him and his son*. We see here, very plainly described, three of the assises of which so much will be said hereafter; the *assisa utrûm fœdum sit laicum an ecclesiasticum*; the *assisa mortis antecessoris*; and the *assisa novæ disseisinæ*. Again, in the statute of Northampton there is mention of a person *rectatus de murthero per sacramentum duodecim militum de hundredo*, and *per sacramentum duodecim liberorum legalium hominum*.

Thus have we endeavoured to trace the origin and history of *the trial by twelve men sworn to speak the truth*, down to the time of Glanville: a further account of it we shall defer, till we come to speak more minutely of the proceedings of courts at this time.

Another novelty introduced by the Normans, was the practice of making deeds with seals of wax and other ceremonies.<sup>3</sup> Of deeds. The variety of deeds which soon after the Conquest were brought into use, and the divers ways in which they were applied for the purpose of transferring, modifying, or confirming rights, deserve a very particular notice.

Deeds or writings, from the time of the Conquest, were some-

<sup>1</sup> Ch. 6.

<sup>2</sup> Ch. 9.

<sup>3</sup> Willk. Leg. Sax. 289.

times called *chirographa*, but more generally *chartæ*; the latter became a term of more common use, and so continued for many years; the former rather denoted a species of the *chartæ*, as will be seen presently. Charters were executed with various circumstances of solemnity, which it will be necessary to consider: these were the seal, indenting, date, attestation, and direction, or compellation.

Charters were sometimes brought into court; either the king's, or the county, hundred, or other court, or into any numerous assembly; and there the act of making, or acknowledging and perfecting the charter was performed. This accounts for the number of witnessess often found to old charters, with the very common addition of *cum multis aliis*. When charters were not executed in this public manner, they were usually attested by men of character and consequence: in the country, by gentlemen and clergymen; in cities and towns, by the mayor, bailiff, or some other civil officer.<sup>1</sup>

The Anglo-Saxon practice of affixing the cross still continued; yet was not so frequent as before; but gave way to a method which more commonly obtained after the Conquest, namely, that of affixing a *seal of wax*. Seals of wax were of various colours. They were commonly round or oval, and were fixed to a label of parchment, or to a silk string fastened to the fold at the bottom of the charter, or to a slip of the parchment cut from the bottom of the deed, and made pendulous. Besides the principal seal there was sometimes a counter-seal, being the private seal of the party. If a man had not his own seal, or if his own seal was not well known, he would use that of another; and sometimes, for better security, he would use both his own and that of some other better known.

The original method of *indenting* was this. If a writing consisted of two parts, the whole tenor of it was written twice upon the same piece of parchment; and, between the contents of each part, the word *chirographum* was written in capital letters, and afterwards was cut through in the midst of those letters; so that, when the two parts were separated, one would exhibit one half of the capital letters, and one the other; and when joined, the word would appear entire. Such a charter was called *chirographum*. About the reigns of *Richard* and *John*, another fashion of cutting the word *chirographum* came into use; it was then sometimes done *indent-wise*, with an acute or sharp incision, *instardentium*; <sup>2</sup> and from thence such deeds were called *indenturæ*.

Charters were sometimes dated, and very commonly they had no date at all; but as they were always executed in the presence of somebody, and often in the presence of many, the names of the witnesses were inserted, and constituted a particular clause, called *his testibus*. The names of the witnesses were written by the clerk who drew the deed, and not by the witnesses themselves, who very

<sup>1</sup> Mad. Form. Diss 26.

<sup>2</sup> *Ibid.* 14, 28, 29.

often could not write. It seems that wives were sometimes witnesses to deeds made by their husbands; monks and other religious persons to deeds made by their own houses; even the king is found as witness to the charters of private men;<sup>1</sup> and in the time of Richard and John, it came in practice for him to attest his own charters himself in the words *teste meipso*.<sup>2</sup>

Charters were usually conceived in the style of a letter, and, at the beginning, they had a sort of direction, or compellation. These were various. In royal charters, it was sometimes, *omnibus hominibus suis Francis & Anglis*: in private ones, sometimes, *omnibus sanctæ ecclesiæ filiis*; but more commonly, *sciant præsentes et futuri*, or *omnibus ad quos præsentēs literæ*, &c.

Thus far of the circumstances and solemnities attending the execution of charters. Let us now consider the different kinds of them; and it will be found, that as they were called *chirographa*, or *indenturæ*, from their particular fashion, so they received other appellations, expressive of their effect and design. A charter was sometimes called *conventio*, *concordia*, *finalis concordia*, and *finalis conventio*. There were also *feoffments*, *demises for life* and *for years*, *exchanges*, *mortgages*, *partitions*, *releases*, and *confirmations*.<sup>3</sup>

*Conventio* and *concordia* had both the same meaning, and signified some agreement, according to which one of the parties conveyed or confirmed to the other any lands, or other rights.

Of all charters the most considerable was a *feoffment*. After the time of the Conquest, whenever land was to be passed in fee, it was generally done by feoffment and delivery or livery of seisin.<sup>4</sup> This might be without deed; but the gift was usually put into writing, and such instrument was called *charta feoffamenti*. A feoffment originally meant the grant of a *feud* or *fee*; that is, a barony or knight's fee, for which certain services were due from the feoffee to the feoffor: this was the proper sense of the word: but by custom it came afterwards to signify also a grant of a free *inheritance* to a man and his heirs, referring rather to the perpetuity of estate than to the feudal tenure. The words of donation were generally, *dedisse*, *concessisse*, *confirmasse*, or *donasse*, some one or other of them. It was very late, and not till the reign of Richard II. that the specific term *feoffavi* was used. These feoffments were made *pro homagio et servitio*, to hold of the feoffor and his heirs, or of the chief lord.

At this early period feoffments were very unsettled in point of form; they had not the several parts which, in after times, they were expected regularly to contain. The words of limitation, to convey a fee, whether absolute or conditional, were divers. A limitation of the former was sometimes worded thus: to the feoffee *et suis*; or *suis post ipsum*, *jure hæreditario perpetuè possidendum*; or *sibi et hæredibus suis vel assignatis*: of the latter thus: *sibi et hæredibus procedentibus ex prædictâ*: *Richardo et uxori suæ*

<sup>1</sup> Mad. Form. Diss. 31.<sup>2</sup> *Ibid.* 32.<sup>3</sup> *Ibid.* 3.<sup>4</sup> Wilk. Leg. Sax. 289.

*et hæredibus suis, qui de eâdem veniunt: sibi et hæredibus qui de illo exhibunt*: from which divers ways of limiting estates (and numberless other ways might be produced) it must be concluded, that no specific form had been agreed on as necessarily requisite to express a specific estate; but the intention of the granter was collected, as well as could be, from the terms in which he had chosen to convey his meaning.<sup>1</sup>

It appears that a charter of feoffment was sometimes made by a feme covert, though generally with the consent of the husband; and a husband sometimes made a feoffment to his wife. A feoffment was sometimes expressed to be made with the assent of the feoffor's wife;<sup>2</sup> or of such a one, heir<sup>3</sup> of the feoffor; or of more than one, heirs of the feoffor;<sup>4</sup> though in such cases, the charter appears to be sealed only by the feoffor. By the assent of the wife, probably, her claim of dower was in those days held to be barred; and indeed, when such feoffment was made publicly in court, it had the notoriety of a fine; and might consistently enough with modern notions, be allowed the efficacy since attributed to fines in the like cases. The assent of the heirs was, probably, where the land had descended from the ancestor of the feoffor; or where by usage it retained the property of *bochland*, not to be aliened *extra cognationem*, without the consent of the heir, where such restriction had been imposed by the original *landboc*.

A clause of *warranty* was always inserted; which sometimes, too, had the additional sanction of an oath. The import of this warranty was, that should the feoffee be evicted of the lands given, the feoffor should recompense him with others of equal value.<sup>5</sup>

A charter of feoffment was not a complete transfer of the inheritance, unless followed by *livery of seisin*. This was done in various ways; as *per fustem*, *per baculum*, *per haspam*, *per annulum*, and by other symbols, either peculiarly significant in themselves, or accommodated by use, or designation of the parties, to denote a transmutation of possession from the feoffor to the feoffee.

This was the nature of a feoffment with livery of seisin, as practised in these early times. It was the usual and most solemn way of passing inheritances in land; but yet was not of so great authority as a *fine*, which had the additional sanction of a record to preserve the memory of it.

The antiquity of *fines* has been spoken of by many writers (a). Some have gone so far as to assert their existence and use in the time of the Saxons.<sup>6</sup> But upon a strict in- A fine.quiry, it is said, there were no *fines*, properly so called, before the

(a) Of this there can be no doubt. Mr Hargreave's opinion also, that fines were originally real concords of existing suits, is clearly well founded. There is a chapter in the *Mirror* about final concords of suits. At what period they became used for

<sup>1</sup> Wilk. Leg. Sax. 5.

<sup>4</sup> Mad. Form. 319.

<sup>2</sup> Mad. Form. 148.

<sup>5</sup> *Ibid.* 7.

<sup>3</sup> *Ibid.* 316.

<sup>6</sup> Plowd. 360.



Conquest, though they are frequently met with<sup>1</sup> soon after that period.<sup>2</sup>

We shall now consider the manner in which fines have been treated, or, as it is now called, *levied*. The account of fines given by Glanville does not enable us to fix any precise idea of the method of transacting them. It only appears from him, that this proceeding was a final concord made by licence of the king, or his justices,<sup>3</sup> in the king's court. But the nature of a fine may be better collected from the more simple manner in which it was originally conducted.

The parties having come to an agreement concerning the matters in dispute, and having thereupon mutually sealed a *chirographum*, containing the terms of their agreement, used to come into the king's court in person, or by attorney, and there acknowledge the concord before the justices: it was thereupon, after payment of a fine, enrolled immediately, and a counterpart delivered to each of the parties.<sup>4</sup> This was the most ancient way of passing a fine. In course of time, fines came to be passed with a *chirographum*, upon a *placitum* commenced by original writ, as in a writ of covenant, *warrantia chartæ*, or other writ. When the mutual sealing of a *chirographum* was entirely disused, there still remained a footstep of this ancient practice; for there continues to this day in every fine a chirograph, as it is called, which is reputed as essentially necessary to evidence that a fine has been levied.

The design of *final concords* seems to have been anciently as various as the matters of litigation or agreement among men. By fines were made grants of land in fee, releases, exchanges, par-

the purpose of transfer or conveyance, irrespective of any real concord of a suit, is uncertain; but there is every reason to believe that it would occur very readily to the minds of people in that early age, when the tendency was to have everything recorded. A law of Canute says, "He who has defended land with the witness of the shire (*i.e.*, the county court), let him have it undisputed," which might suggest recovery; and in the laws of Henry I. it is said, speaking of the county court, "*Recordationem curiæ regis nulli negare licet*" (c. xxxi.), which might easily suggest the idea of fines or recoveries. In the Saxon law mention is more than once made of transactions being attested in the county court. There was a particular reason why fines or recoveries should be of very early origin in our law, that the great body of the people held their land then without deeds or charter of conveyance. This is fully explained in the *Mirror*, in a passage, the antiquity of which is evident. It is said there that the first conquerors enfeoffed persons in knight-service, or villenage (no mention is made of freehold feoffments), and that many held their lands by villein customs—as to plough, &c., the lord's land. The lords might give them estates of inheritance, or if the lord received their homage for such estates, it would be the same thing. Thus the people, it is said, had no charters, deeds, nor muniments of their lands; but it is said many fines were levied of such services, which make mention of the doing of these services (*Mirror*, c. ii. s. 25). It would be natural in such a state of society to resort rather to public transactions in the county courts than to formal conveyances.

<sup>1</sup> Mad. Form. Diss. 7.

<sup>2</sup> The origin of fines is very fully considered by Mr Cruise, in his valuable Essay on Fines, who thinks, and with great show of reason, that fines were contrived in imitation of a similar judicial transaction in the civil law.—Cruise's *Fines*, p. 5.

<sup>3</sup> Lib. viii. c. 1.

<sup>4</sup> Mad. Form. Diss. 14.

titions, or any convention relating to land, or other rights: in a word, everything might be transacted by fine which might be done by *chirographum*.<sup>1</sup>

Thus far of the two great conveyances in practice for transferring estates of inheritance, namely, *feoffments* and *fin*es. The manner in which estates for life or for years (since called demises) were made, was in the way of convention or covenant.<sup>2</sup>

Two other species of conveyance then used were *confirmations* and *releases*. In those unsettled times, when feoffees were frequently disseised upon some suggestion of dormant claims, charters of confirmation were in great request. Many confirmations used to be made by the feoffor to the feoffee, or to his heirs or successors. Tenants in those times hardly thought themselves safe against great lords who were their feoffors, unless they had repeated confirmations from them or their heirs. Releases were as necessary from hostile claimants, as confirmations from feoffors. The words of *confirmation* were *dedi, concessi, or confirmavi*; and such deeds are distinguishable from original feoffments, only by some expressions referring to a former feoffment. *Releases* are known by the words *quietum clamavi, remisi, relaxavi*, and the like.

During the time which had elapsed since the Conquest, the Norman law had sufficient opportunity to mix with all parts of our Saxon customs. This change was not confined to the article of tenures, duel, juries, and conveyances. The manner in which justice was administered makes a distinguished part of the new jurisprudence. In the Saxon times, all suits were commenced by the simple act of the plaintiff lodging his complaint with the officer of the court where the cause was to be heard; and this still continued in the county and other inferior courts of the old constitution. But when it had become usual to remove suits out of these inferior courts, or of beginning them

Of writs.

more frequently in the king's court, it became necessary to agree upon some settled forms of precepts applicable to the purpose of compelling defendants to answer the charge alleged by plaintiffs (*a*). Such a precept was called *breve*; probably, because it

(*a*) King's writs indicate the jurisdiction of king's courts, for in the county courts men could sue without writs, which were only required to commence actions in the king's superior courts. The usage of such writs, therefore, marks an important era in our legal history. As already shown, the primary jurisdiction, after or before the Conquest, in common suits between party and party, was in the county court, which was called "*curia regis*" (*Leges Hen. Prim.*) And hence the *Mirror*, in an early chapter, headed, "Of the time of Alfred," gives as the form of remedial writ, a writ to the sheriff to compel him to decide the case and do justice. In a subsequent chapter, however, stating what the law was at the time the book was compiled (Edward I.), it is said, "There are two kinds of jurisdiction, ordinary and assigned; every one hath ordinary jurisdiction," (*i. e.*, in the county,) "but this jurisdiction is now restrained by the power of kings, as none hath power to hold plea of trespass, or of debt which passeth forty shillings, but the king. Nor hath any one power of conveyance of fees" (*i. e.*, of freehold estates) "without a writ" (*c. iv. s. 2*), which is also laid down in Bracton and Fleta. Now this change must have taken place after the Conquest, and

<sup>1</sup> Mad. Form. Diss. 16, 17.

<sup>2</sup> *Ibid.* 22.

contained *briefly* an intimation of the cause of complaint. It was directed to the sheriff of the county where the defendant lived,

the origin of it can be traced. Before the Conquest writs went to the sheriff to compel him to hear a case, and it was then contended that writs were necessary to enable him to do so. And the writs were often required to give a better judge. In the case of the Archbishop of Canterbury, already mentioned as having occurred under William I., the case was tried at the county court, but before a foreign prelate, who of course could not have been sheriff, and who could only have sat under the king's writ. And thus the practice having arisen of using the king's writ in important cases, in order to secure a better judge than the sheriff, it by degrees came to be considered that the writ was necessary to give jurisdiction in any but comparatively minor cases. Not a trace of any such doctrine is to be found before the Conquest, nor until long afterwards; and we have seen cases of the greatest character come into the county court. It had, however, evidently become established at the time of the Great Charter, for it is laid down by Bracton; whereas, in the *Mirror*, we find that forty shillings was the limit, not of the county court, but of the court baron (c. i. s. 3). But Bracton, writing just after the time of the Charter, says that the sheriff under the king's writ tried cases he could not try *ex officio*, but tried them as the justice of the king (s. 6). Thus, therefore, the king's writ being required to give jurisdiction, it of course was natural that the suitor should seek to sue in the king's superior court; and hence, just before the Charter, common pleas were brought, as all the records show, in the exchequer; wherefore the Charter said they should not follow the king as that court did, and hence the court of common pleas. Thus, therefore, now the king's writs to the sheriff were required either to give him jurisdiction to try the case, or to give the king's court jurisdiction to try it. In either case the writ went to the sheriff—a curious trace of the old system; for otherwise they would have gone to the party, or to the court. The *Mirror* says that these writs used to contain the names of the parties and the name of the judge, and were directed sometimes to sheriffs, &c., and that they were necessary to give jurisdiction not possessed at common law. At common law, as has been seen, the primary jurisdiction was in the county court in "common pleas" between subject and subject, though they could be removed into the king's court for sufficient cause. But in order to derive a revenue out of the administration of justice, and at the same time promote its improvement, a practice had arisen of requiring the suitor in cases above forty shillings to sue out a writ from the king. And, in like manner, in order to remove a case from the county court into the king's superior court, a writ was required; and to commence an action in the king's court. When the suitor was required to sue out a writ to commence a suit in the county court above a certain value, there was, of course, an inducement to sue in the king's court, as probably the fee was the same. Moreover, there were cases in which the party sued did not reside in the county where the matter arose, and in such cases the suit could not be brought into a county court without a king's writ—as the sheriff of one county had no jurisdiction over men in another, and the men of one county could not try cases arising in another. But the king's writ went into any county, and the case commenced in the king's superior court could still be tried in the county where the matter arose. Hence, for various reasons, the necessity for writs from the king's superior courts. These writs were, it will be seen, of two classes—either to the sheriff to empower him to do justice, and try the case in his county, which was called a writ of justices, or a writ to commence an action in the king's superior court, and therefore "returnable," as the phrase was in that court. In either case, however, so deeply rooted was the county court in our judicial system, the writ went to the sheriff of some county, who was to summon the party sued, to answer in the suit; and to enable him to do so, or inform him what steps to take with a view to the proceeding he might desire to take, the writ briefly stated the cause of complaint. The reason for this was, that the writ commanding appearance in court, and the appearance being personal, and the pleading oral, the parties upon appearance could at once commence their controversy, the plaintiff narrating his cause of complaint more fully; and the defendant, unless he desired time to consider his defence, would at once make his answer; and of course the more clear the writ, the better he would be able thus to answer. The course, upon appearance in the king's court, would, it should seem, as the pleading was oral, be very much the same, at first, as in the county court, until the point in dispute appeared. If it was matter of law, it would at once be decided by the court; if matter of fact, it would be sent into the county to be tried, and that would require a record.

commanding that he should summon the party to appear in some particular court of the king, there to answer the plaintiff's demand, or to do some other thing tending to satisfy the ends of justice.

The necessity of such *brevia* was very obvious; for though, while most suits were transacted in the county court, it was sufficient to enter a plaint with the officer of the court; and the process issuing thereupon being to be executed by the sheriff, who was present, or supposed to be present, in court as judge, was not likely to be extremely illegal or irregular, even when warranted perhaps by nothing more authentic than verbal directions; yet, when suits were commenced in the king's court, at a great distance from the habitation of the parties, and process was to issue to him merely as an officer, who knew nothing more of the matter than what the precept explained, it was necessary that something more particular should be exhibited to him; and therefore, that the precept should be *written*. Hence perhaps it is, that the *breve* was called also a *writ*.<sup>1</sup>

These *writs* were of different kinds, and received different appellations, according to the object or occasion of them. The distinction between writs furnished a source of curious learning, which led to many of the refinements afterwards introduced into the law. The assigning of a writ of a particular frame and scope to each particular cause of action; the appropriating process of one kind to one action, and of a different kind to another; these and the like distinctions rendered proceedings very nice and complex, and made the conduct of an action a matter of considerable difficulty.

The cultivation of this kind of learning was encouraged by a regulation of the new law, which was designed for the more useful purpose of preserving the judgments and opinions of judges for the instruction of succeeding ages: this was the practice of entering proceedings of courts upon a roll of parchment, which was then called a *record* (*a*). Of records.

The practice of registering upon *rotuli*, or rolls of parchment,

(*a*) There were other and stronger reasons for records than those here mentioned; and, indeed, records of judicial proceedings will be found necessarily incident to any regular system of judicature and procedure; and, therefore, they are to be traced in the times immediately following the era of the Conquest, when, as we have seen, attempts were made to improve the turbulent popular assemblies of the Saxons, and introduce something like judicial tribunals, and some kind of regular procedure. Lord Coke cites a supposed record of the great suit in the county court soon after the Conquest, of which mention is made by our author at the end of the first chapter, and which has more than once been mentioned in these notes as the first instance of anything like a regular judicial trial (*Preface to the 9th Part of "Coke's Reports"*). Whether or not that particular record is authentic, it is manifest that so soon as regular judges sat, and regular trials took place, in the county court, records of the proceedings would, for various reasons, be required; and it is certain that such judicial records became the practice, for in the *Leges Henrici Primi* mention is more than once made of the records of the "*curia regis*," which at that time, as the context clearly shows, meant the county court: "*Recordationem curiæ regis nulli licet negare.*" In the reign of Henry I., as we have seen, regular judges sat in the

<sup>1</sup> We have before seen that deeds, among the Saxons, were called *Gewrite*.—*Vide ante*, p. 10.

was entirely Norman; nor did it obtain to any great extent till long after the Conquest. Among the Saxons, the manner of registering was by writing on both sides of the leaf; and this was either in some *evangelisterium*, or other monastic book, belonging to a religious house. It was thus that the memory not only of pleas in courts, but of purchases of land, testaments, and of other public acts, was preserved. This practice, like other Saxon usages, continued long after the invasion of William. We find that Domesday, the most important record of the exchequer in those times, consists of two large books. But in the time of Henry I. we find *rotuli annales* in the exchequer for recording articles of charge and discharge, and other matters of account relating to the king's revenue. It is conjectured that the making enrolment of judicial matters in the *curia regis* was posterior in point of time to the same practice in matters of revenue; and was dictated by the experience of its utility in that important department.<sup>1</sup> This innovation gave rise to the distinction between *courts of record* and courts not of record.

A record began with the entry of the original writ; rehearsed the statement of the demand, the answer or *plea*, the judgment of the court, and execution awarded. Thus a record contained a short history of an action through all its stages. When proceedings were entered in this solemn manner, and submitted to the criticism and exception of the adverse party, it became very material to each that his part of the record should be drawn with all accuracy and precision. When this attention was observed in completing a record, it became a very authentic guide in similar cases. Records were in high estimation; and, as they continued the memorials of judicial opinions, tended to fix the rules and doctrines of our law upon the firm basis of precedent and authority.

Such were the more conspicuous parts of the juridical system introduced by the Normans, and such were the changes they underwent during the period that elapsed before the end of the reign of king John.

courts of the counties, directed upon matters of law, and directed the juries, who were sworn to determine matters of fact, on whose verdicts judgment was given. These judgments would be of little use if the same matter might be litigated again between the same parties, and, to prevent this, was one great use of records; and this probably was alluded to in the passage from the Laws of Henry I., just quoted, for it has from the most ancient times been the rule of law that a verdict and judgment on the same matter, between the same parties, was final. Again, the great object of law being certainty and uniformity of decisions, this required an appellate jurisdiction, and that necessarily required records; for unless the matter was recorded, the superior court could not exercise its jurisdiction. Hence the appellate jurisdiction of the "*curia regis*," and the practice of recording judicial proceedings, can be traced together to these ancient times, and have ever since been united. Hence, when it was desired to give an appeal to a court of error from the rulings of the judges upon trials, the statute of Westminster (*temp.* Edward I.) required the matter to be recorded; and hence the ancient writ of "*recordare facias*," to remove a matter from an inferior court. Thus, therefore, for various reasons, records and regular procedure were necessarily connected together.

<sup>1</sup> See Ayloffe's Ancient Charters, Introd.

## CHAPTER III.

### HENRY II. (a)

*Of Villeins—Dower—Alienation—"Nemo potest esse Hæres et Dominus"—Of Descent—Of Testaments—Of Wardship—Marriage—Of Bastardy—Usurers—Of Escheat—Maritagium—Homage—Relief—Aids—Administration of Justice—A Writ of Right—Essoins—Of Summons—Of Attachment—Counting upon the Writ—The Duel—The Assize—Vouching to Warranty—Writ of Right of Advowson—Of Prohibition to the Ecclesiastical Court—The Writ de Nativis—Writ of Right of Dower—Dower unde Nihil.*

IN the former chapter it was endeavoured to trace the history of the principal changes made in the law from the time of William the Conqueror down to the reign of king John; but the object of this work being to give a correct idea of the origin and progress of our whole judicial polity, something more satisfactory will be expected than the foregoing deduction. It will be required to state fully, and at length, what was the condition of persons and property; how justice, both civil and criminal, was administered; with the process, proceeding, and judgments of courts; in short, to give a kind of treatise of the old jurisprudence, with a precision, and from an authority, that will at once instruct the curious, and have weight with the learned. When this is done, it will be a foundation on which the superstructure of our juridical history may be raised with consistence; every modification and addition being pursued in the order in which it arose, the connexion and dependence of the several parts will be viewed in a new light, and the reason and grounds of the law be investigated and explained more naturally, and, it is trusted, with more success than in any discourse or desultory comment upon our ancient statutes, however copious and learned.

In order to lay this foundation of the subsequent history, it seems that some point of time during the period between the Conquest and the reign of king John should be chosen, and that the contemporary law of that time, in all its branches, should be stated with precision and minuteness (b). The laws of Edward the Confessor,

(a) *Vide* note to the heading of c. ii.

(b) It would have been better to have taken the *Mirror of Justice* for this purpose, or at all events to have had some regard to it, since it is more full and complete as regards the scope of its subjects, and because, as it was based upon a work as ancient as the time of the Saxons, and contains cases and ordinances from the time of the Conquest to the time when it was finally completed (Edward I.), it exhibits the course and progression of our legal history far better than any known work; whereas Glanville, to whom our author confines himself, states the law (only upon matters that came within the cognizance of the king's chief court, and upon some subjects not fully, and upon others not at all) as he understood it to be in his day. Elsewhere, in the reign of Edward I., the author notices the *Mirror* cursorily, and merely

considered according to the present opinion, as a performance of some writer in the reign of William Rufus, and the laws of Henry I., are the earliest documents that could at all be viewed with any hopes of information of this kind; but these throw so little light

observes that some part of it was written as late as that reign, and then dismisses it, and makes no more use of it. It is evident that he had read only the first chapter, in which the name of that king was mentioned in this way, "Many ordinances were made by many kings until the time of the king that now is," Edward I. (c. 1, s. 3), from which he hastily inferred that, as it was a work written in that time, it would throw no light upon the history of the law in previous times; whereas, on a little attention to this very passage, he would have seen that it was quite otherwise, and that this work, of all others, is calculated to throw light upon our legal history during its whole course, from the time of the Saxons up to the time of Edward I. And, upon a perusal of it, he would have seen that there is no difficulty at all, with a little attention to the contents, and a knowledge of legal history, in searching out the age or era to which each part belongs. For instance, the large portions which have already been made use of in these notes, as clearly belonging to the Saxon age. In like manner, various portions have been used in the foregoing chapter as belonging to the era of the Conquest, *i.e.*, to the reign of the Conqueror and his immediate successors. So certain portions are clearly marked out as belonging to the period covered by the present chapter, the important era of the reign of Henry II.; as, for example, trial by battle, which was not used at all after John's reign. So as to villenage, which, in its worsor or lower sense, probably became obsolete during the same period. It may be convenient in this place to present at once such portions of the *Mirror* as appear plainly to relate to the period covered by this chapter. Sometimes the precise age or time of the law alluded to is marked by the passage itself, as thus, in stating the law as to coroners, "In case a man dieth by a fall, in such a case, according to Ranulph de Glanville, it is ordained that whatever is cause of death is deodand" (B. i., c. 13). That clearly refers to some decision or judgment of Glanville, who was chief justiciary under Henry II.; and it is observable that the "ordinance" is not to be found in Glanville, whose work, indeed, is confined, as already mentioned, to matters which came under the cognizance of the king's court, and therefore did not include matters which came under the cognizance of sheriffs or coroners, as to which the *Mirror* is very copious. It may be observed upon this passage, as to deodands, that it illustrates the growth and progress of our laws by judicial decisions, sometimes called "ordinances" of the kings under whom they were pronounced, and many of which are to be found scattered through the *Mirror*; and are in these notes collected, under the period to which they appear to belong, as in the instance already adduced. So, again, of misadventures in tournaments, in courts and lists. King Henry II. ordained that "because at such duels happen many mischances, that each of them (the combatants) take an oath that he beareth no deadly hatred against the other, but only that he endeavoureth with him in love to try his strength in those common places of lists and duels, that he might the better learn him to defend himself against his enemies; and therefore such mischances are not supposed to be felony, nor have the coroners to do with such mischances which happen in such common meetings, where there is no intent to commit felony" (*Ibid.*) This is a piece of law applicable at the present day to the case of parties fencing with buttoned foils, &c., and one of them accidentally killing the other; but otherwise of a real duel, where each does intend to strike or to fire, for to strike or fire with a deadly weapon is felony, as the intent to kill or wound is implied from the act. It may here be mentioned that it appears plainly from the *Mirror*, and the manner in which passages speaking of juries in criminal cases are mixed up with passages obviously at least as ancient as this period, that trial by jury in criminal cases was now common. With regard to civil cases, there is a passage fitly inserted here as illustrative of what the law of procedure was previous to the work of Glanville, "An assize in one case is nothing more than a session of the justice; in another case it is an ordinance of certainty, where nothing could be more or less than right. For the great evils which were used to be procured in witnessing, and the great delays which were in the examinations, exceptions, and attestations, Ranulf de Glanville ordained this certain assize (of writ of right) that recognitions should be sworn by twelve jurors of the next neighbours, and so this establishment was called assize" (c. 2, s. 25).



on the Norman jurisprudence, that they furnished small assistance, even in the historical sketch contained in the preceding chapter. The new jurisprudence seems not to have been thoroughly established, or at least tolerably explained, till the reign of Henry II., when we meet with the treatise of Glanville. The method, scope, and extent of this venerable book mark the reign of Henry II. as the most favourable period for our purpose. As, therefore, it may be collected with considerable accuracy from that author what the law was towards the end of the reign of Henry II., we shall, with his aid, take a complete view of it; and, having done that, we shall proceed with more confidence to consider the subsequent changes made by parliament and by courts in the reigns of Henry III., Edward I., and his successors, as to an inquiry that may be followed with ease, instruction, and delight. This account of our laws at the close of Henry II.'s reign will be divided into the rights of persons, the rights of things, and the proceedings of courts. We shall begin with the first.

The people, as among the Saxons, were divided into freemen and slaves, though the latter assumed, under the Norman polity, a new appellation, and were called *villani*, or *villeins* (a).

(a) It has been already pointed out that the author was in error in supposing that the villeins ever were slaves. He confounded the "theows" (or thralls), who were slaves, with the "ceorls" (or churls), who were not. It was the latter—the "coloni" of the Roman law, and so called in the Latin version of the Saxon laws—who were the originals of the "villeins" or "villani" under the Normans, though it is certain that in the course of time, and by force of custom, the thralls were raised to the position of villeins, and many of the villeins became in like manner copyholders or tenants in socage, or freeholders; and, on the other hand, the thralls thus raised to the rank of villeins were naturally put to the viler and baser kind of service, as, for instance, the carrying and spreading of dung—the case put by Littleton in his chapter on the subject—and thus by degrees the word villein acquired a lower sense and meaning, as the original villeins became copyholders. It has already been seen that villeins were considered copyholders, and are so called in the *Mirror*, where it is said that the long tenure of copyhold land does not make the freeman a villein (c. iii., s. 2); and it is said elsewhere in that ancient work, "It is an abuse that it is said that villenage is not a freehold, for a villein and a slave are not all one, either in name or signification, as every freeman may hold land in villenage to him and his heirs, performing the services" (c. 5). And again, it is an abuse to hold villeins for slaves, and this abuse causeth great distinction of poor people (*Ibid.*) Yet elsewhere in the same chapter it is said to be an abuse that villeins were deemed freemen, or admitted into frankpledge as freemen (*Ibid.*) It is evident that there were two orders of villeins—the one personally so, from being in the position of feudal serfs, probably from having been slaves, and therefore serfs by birth, and their issue equally so; and tenants in villenage, who might be of this lower class, or might be of a better class, according to the nature of their services. If the services were vile and base, as to spread dung, they were of a lower order, and probably would be serfs, though still not slaves; and not necessarily even serfs, for freemen might be tenants in villenage if they chose to be so. If the services were of a higher nature, as to plough or sow the land, then they were still tenants in villenage, though not serfs or villeins, and by degrees this class became by custom either copyholders or freeholders. The only distinction between those classes, the service of both being to plough and sow, as Littleton shows in his chapter on tenancy in socage, or freehold tenure, was, that in the latter case this sort of service was converted by custom into certainty, and thus gave by customary right or implied grant, if not by actual grant, a freehold; whereas in the other—the copyhold tenure—the service, though not base, was still uncertain in its nature; so that the land was still held by custom according to the will of the lord. As, however, the tenant had a right to his tenement, rendering the service, which by



Of villeins, those were called *nativi* who were such *à nativitate*, as when one was descended from a father and mother who were both villeins *à nativitate* (a). If a freeman married a woman who was born a villein, and so held an estate in villenage, in her right,

as long as he was bound to the villein services due on account of such tenure, he lost, *ipso facto*, his *lex terræ*, as a villein *à nativitate* (b). If children were born from a

degrees got changed into a money fine on alienation, practically the tenancy, even in the case of copyholds, became legally secure, subject to the liability to such fines : and, as to the socage tenure, that was by degrees converted either into a money rent or a money fine, and thus the tenants who held on plough service became converted into copyholders or freeholders. The villeins, however, whose services were base and vile, still continued for a long time in a state of transition, slowly rising by degrees to the position of husbandry tenants of manors, or continuing in their low and servile condition, and this occasioned the uncertainty as to the real *status* of a villein or a tenant in villenage. The substantial distinction, however, was, that the tenant in villenage might or might not be a villein, and that a villein was so at this period by birth (because there had been no new conquest, and no fresh creation of thralls or villeins since the Norman), and on the same principle their issue also were villeins. In the one class the villenage was personal, though still only predial ; in the other, it was merely a character of tenure.

(a) As already shown, at this period there could be no villeins who were not *nativi* ; for villenage was necessarily a personal *status*, whereas *tenure* in villenage was a mere kind of tenure. And thus, in the *Mirror*, it is said that, in an action of villenage the man might say that the services he had rendered, and which were relied on as a proof of villenage, were for the services of villein-land he held, and not by service of blood (c. iii. s. 23). There is not a more interesting branch of the history of the law than that which relates to the gradual emancipation of the slaves and of the villeins. No statutes were passed to effect either ; both were the results of judicial decisions. As regards both classes, the courts, it is clear, threw the onus of proof upon the man who claimed another as his slave or serf ; and, on the other hand, held any act on the part of the lord which looked like a recognition of freedom, to be evidence of emancipation ; the result of which was, that even by the time of the *Mirror*, which was not later than the reign of Edward I., villenage, as a personal state, was, it is manifest, dying out, though it remained much longer as a character or kind of tenure. The author omitted to notice this indirect means of emancipation, though its effect must have been more powerful than any other. Thus, for instance, the *Mirror* says, that if a man could show a free stock of his ancestors, he would be accounted a freeman, although his father, mother, brother, and cousins, and all his parentage, acknowledged themselves to be the plaintiff's villeins, and testified the defendant to be a villein born :—about as powerful an exertion of the principle of presumption in favour of liberty as it is possible to imagine. And it is a most interesting illustration of the efficacy of judicial decisions as a means of modifying the law, and the salutary and certain effect of such judicial means. The *Mirror* states that a villein could be emancipated if his lord suffered him to answer, without him, in a personal action, or to sit as juror among freemen, or by proof of a free ancestor at any period, however remote (for, as Lyttleton says, a villein could only be by prescription, on the ground that his ancestors had been so time out of mind), also, if the villein departed out of the manor, and was not retaken within a year ; or if he were allowed to be a suitor in another court than that of his lord ; and so, as it is obvious that the acts or defaults of the lords, which had the effect of emancipating their villeins, were so numerous, that villenage, as a personal state, must have very rapidly disappeared, especially when, in Magna Charta, there was a distinct recognition that a villein was capable of property (*vide post*, c. iv.)

(b) According to Glanville, it was the same where the father was free if the mother was villein-born, or if the father was villein-born though the mother was free. This was contrary to the civil or canon law, under which the maxim was, that the issue followed the mother ; and there is a discussion in Fortescue's treatise, *De Laudibus Legum Angliæ*, upon this point, in which the chancellor defends the

father who was *nativus* to one lord, and a mother who was *nativa* to another lord, such children were to be divided proportionably between the two lords<sup>1</sup> (a).

A villein might obtain his freedom in several different ways. The lord might quit-claim him from him and his heirs for ever, or might give or sell him to some one, in order to be made free, though it should be observed that a villein could not purchase his freedom with his own money; for he might in such case, notwithstanding the supposed purchase, be claimed as a villein by his lord; for all the goods and chattels of one who was a *nativus* were understood to be in the power of his lord, so as that he could have no money which could be called his own to lay out in a redemption of his villenage (b). However, if some stranger had bought his freedom for him, the villein might maintain such purchased freedom against his lord; for it was a rule, that where any one quit-claimed a villein *nativus* from him and his heirs, or sold him to some stranger, the party who had so obtained his freedom, if he could establish it by a charter, or some other legal proof, might defend himself against any claims of his lord and his heirs: he might defend his freedom in court by duel, if any one called it in question, and he had a proper witness who heard and saw the manumission. But though a man could make his villein *nativus* free, as far as concerned *his* claim and that of his heirs, he could not put him in a condition to be considered as such by others; for if such a freed man was produced in court against a stranger to deraign a cause (that is, to be the champion to prove the matter in

rule of the common law. That the civil law was right will be seen at once, when it is observed that, from the common law rule (as our author, quoting Glanville, goes on to state), this monstrous result followed, that if the mother was on one manor, and the father was a villein on another, the children were divided between the two lords, as Lord Littleton observed, like cattle. This monstrous consequence did not occur to the chancellor when he was vehemently maintaining the common law, which, wherever it deviated from the civil law, lapsed into barbarism.

(a) The reason of this was, that the woman was a *villein born*, in a personal state of villenage, and he held in her right; and therefore, during her life, lost his *status* of complete freedom; that is, his civil rights, as a freeman, to sit on juries, vote, &c. Lord Littleton, no doubt, intended to convey this when he rendered the meaning thus: "That if a freeman married a woman born in villenage, and *who actually lived in that state*, he thereby lost the legal rights of a freeman, and was considered as a villein by birth, during the lifetime of his wife, on account of her villenage" (and he refers to Bracton, lib. 5). In Britton's time, the wife was enfranchised during the coverture, in such a case (78).

(b) The author has omitted to notice another, and a very efficacious means of emancipation, by a grant of freehold land from the lord. "Villeins become freemen if their lords grant or give unto them any free estate of inheritance to descend to their heirs" (*Mirror*, c. i. s. 28). And be it observed, that mere *possession* and receipt of the profits would be evidence of such a gift; which, it will be remembered, might be by feoffment; and it is also to be remembered, that the rendering of services, of socage or plough service, would be no proof of villenage; for, as Lyttleton points out, that was the nature of common freehold tenure; nor, at all events, if the socage service rendered was *certain*, would it be any proof of villenage; for it might be tenure in socage, and that would be a *freehold* tenure. The number of villeins who thus obtained their freedom must have been immense.

<sup>1</sup> Glanv. lib. 5, c. 6.

question) or to make his law,<sup>1</sup> or law-wager, as it has since been called, and it was objected to him that he was born in villenage, the objection was held a just cause to disqualify him for those judicial acts; nor could the original stain, says Glanville, be obliterated, though he had since been made a knight. Again, a villein *à nativitate* would become *ipso facto* free, if he had remained a year and a day in any privileged town (a), and was received into their *gylda* (or guild, as it has since been called) as a citizen of the place.<sup>2</sup>

Nothing is said by Glanville (b) concerning the different ranks of freemen; we shall therefore proceed to the next object of consideration, which is, the right of property claimed by individuals under various titles and circumstances, as *dos*, or dower, belonging to a

(a) This was taken from a law of the Conqueror: "Si servi permanserint sine calumnia per annum et diem in civitatibus nostris vel in burgis in muro vallatis, vel in castris nostris, a die illa liberi efficiuntur, et liberi a jugo servitutis suæ sint in perpetuum" (*Leg. Will.*, 66). By privileged town, in the text, Lord Littleton thought was meant a town that had franchises by prescription or charter; and this law, he truly observes, shows the high regard for the law of such corporations, and also a desire to favour enfranchisement as much as the settled rules of property would permit (*Hist. Hen. II.* vol. iii., p. 191).

(b) Our author, it will be observed, follows Glanville implicitly, and simply incorporates Glanville's work with his own. It did not fall within the compass of Glanville's work to enter into the distinction of ranks or orders, because he dealt only with the proceedings in the *curia regis*; but there was light to be derived from other sources on the subject, as the *Mirror* and the Laws of Henry I., which represent what the body of the law was during the whole of this period, although, no doubt, in a constant course of progression and of development. It is in this, the main element of history, our author is deficient. As regards the question of ranks and grades of the people, the fundamental distinction was between free and servile; and this was most important, and was closely connected with the tenure of land, from which resulted consequences of great importance; for it resulted that, by a change in the tenure of a man's lands, his personal condition might be changed, which would affect his whole *status* and position, and not merely his social position, but his legal rights; for a villein could not sit in the court of the hundred, or the county, nor upon a jury, or a court-leet, nor enjoy any of the legal privileges of freemen. Hence, in the laws of Henry I., it is said, that only freeholders could sit in the courts: "Villani vero, vel cotseti, vel qui sunt viles et inopes personæ, non sunt inter regnum judices numerandi, nec in hundredo vel in comitatu" (c. xxix.) So, in the *Mirror* it is said, that villeins cannot be jurors, &c.; and it is put as an abuse that villeins should be in "frankpledges," or pledges of freemen, or that a man should be summoned (i.e., to the courts, or on a jury), who was not a freeholder (c. v. s. 1). In those times, in short, a *liber homo*, or freeman, meant a freeholder; and a man who was not a freeholder was not deemed a freeman, and the two terms were, as in the passage just cited, used as synonymous. But then, on the other hand, it was deemed an abuse to treat villeins as slaves, and an error to think that all who held land in villenage must be villeins. Freemen might hold land in villenage, having freehold land besides; but a man who could not hold land for himself was a villein. No villeins, or any who were not freeholders, could be summoned or be summoners (c. ii. s. 29); but, then, villeins became freemen if they became freeholders, and though they could not acquire freehold land from any but their lords, their very incapacity being that they could not, except from their lords, acquire freehold property, yet, if their lords gave them any estate of inheritance, or accepted their homage, they became free. And so, if their lords allowed them to be sworn as jurors, or in the county court, or to remain away from their manors for a year—in these, and many such cases, the villeins became free. The result was, that there was a constant process of change going on in society, men becoming free who were before servile, and thus gaining the position and privileges of freemen.

<sup>1</sup> *Legem facere*.

<sup>2</sup> Glanv. lib. 5, c. 5.

widow, *maritagium*, and the like; after which we shall speak more particularly about succession to lands, and the nature of tenures, as the law stood in the reign of Henry II.

The term *dos*, or dower, had two senses. In the common and usual sense, it signified that property which a freeman gave to his wife *ad ostium ecclesie*, at the time of the espousals (*a*). We shall first speak of *dos* in this sense of it. When a person endowed his wife, he either named the dower specially, or did not. If he did not name it specially, the dower was understood, by law, to be the third part of the husband's *liberum tenementum*; for the rule was, that a reasonable dower of a woman should be a third part of her husband's freehold which he had at the time of the espousals, and was seised of in demesne. If he named the dower specially, and it amounted to more than the third, such special dower was not allowed, but it was to be ad-measured to a fair third; for, though the law permitted a man to give less than a third in dower, it would not suffer him to give more.<sup>1</sup>

If a man had but a small freehold at the time of the espousals when he endowed his wife, he might afterwards augment it to a third part, out of purchases he had made since; but if there had been no provisional mention of new purchases at the time of such assignment of dower, although the husband had then but a small portion of freehold, and had made great acquisitions since, the widow could not claim more than the third part of the land he had at the time of the espousals. In like manner, if a person had no land, and endowed his wife with chattels (*b*), money, or other things, and afterwards made great acquisitions in land, she could not claim

(*a*) This is all a translation of Glanville. The other sense in which the word is used, he afterwards explains to be that in which it was used by the Romans, as the endowment given to the man with a woman (vol. vii.), which corresponds, he says, with what is called *maritagium*, or marriage-hood, as to which our author proceeds afterwards to translate him. It may be convenient here to recite what is said in the *Mirror* on the subject of dower, in the ancient sense:—"It was ordained that every one might endow his wife, *ad ostium ecclesie*, without the consent of his heirs, though widows, if they married without the consent of their lords, would lose their dowries." It is to be observed, that it is further stated in the *Mirror*, that "knights' lands came to the eldest son, and that common freehold land was divisible among the right heirs, and that no one might alien more than the fourth part of his inheritance, without the consent of his heirs, and that none might alien his land acquired by purchase away from his heirs, if the power of alienation were not given" (*c. i.*) It may be doubted whether it was not so unless it were taken away.

(*b*) This is confirmed in Fleta (lib. v. c. 23); but it is added, that the dower, in such case, could only be claimable as far as the *chattels* of the deceased extended (and clear of his debts)—that is, the realty would not be liable to make good the deficiency. Hence, at common law, this kind of dower became obsolete, and in the reign of Henry IV. it was denied to be allowable (*Year-book*, 7 *Hen. IV.*, f. 13). That is only an illustration of the ignorance of our common law judges, who then had ceased to be students of the civil law, and merely were guided by the fluctuating customs of the time. In later times courts of equity, in this as upon so many other subjects, repaired the deficiency of law; and in our own day jointures have practically superseded dowers.

<sup>1</sup> Glanv. lib. 6, c. 1.

any dower in such acquisitions ; for it was a general rule, that where dower was specially assigned to a woman *ad ostium ecclesiæ*, she could not demand more than what was then and there assigned.<sup>1</sup>

A woman could make no disposal of her dower during her husband's life ; but as a wife was considered *in potestate viri*, it was thought proper that her dower and the rest of her property should be as completely in his power to dispose of them ; and therefore every married man, in his lifetime, might give, or sell, or alien in any way whatsoever, his wife's dower ; and the wife was obliged to conform in this, as in all other instances, to his will. It is, however, laid down by Glanville, that this assent might be withheld ; and if, notwithstanding this solemn declaration of her dissent<sup>2</sup> and disapprobation, her dower was sold, she might claim it at law after her husband's death ; and, upon proof of her dissent, she could recover it against the purchaser.<sup>3</sup> Besides, it must be remarked, that the heir in such case was bound to deliver to the widow the specific dower assigned her, if he could ; and if he could not procure the identical land, he was to give her a reasonable *excambium*, as it was called, or recompense in value ; and if he delivered her the land that was sold, he was in like manner bound to give a recompense to the purchaser.<sup>4</sup> If the assignment at the church-door was in these words, "*Do tibi terram istam cum omnibus pertinentiis* ; and he had no appurtenances in his demesne at the time of the espousals, but he either recovered by judgment, or in some other lawful way acquired such appurtenances ; the wife might, after his death, demand them in right of her dower.<sup>5</sup>

If there was no special assignment of dower, the widow was entitled, as we before said, to the third part of all the freehold which her husband had in demesne the day of the espousals, complete and undiminished, with its appurtenances, lands, tenements, and advowsons ; so that, should there be only one church, and that should become vacant in the widow's lifetime, the heir could not present a parson without her consent. The capital messuage was always exempt from the claim of dower, and was to remain whole and undivided ; nor were such lands to be brought into the division for dower, which other women held in dower upon a prior endowment. Again, if there were two or more manors, the capital manor, like the capital messuage, was to be exempted, and the widow was to be satisfied with other lands. It was a rule, that the assignment of dower should not be delayed on account of the heir being within age.

If land was specially assigned for dower *ad ostium ecclesiæ*, and a church was afterwards built within the fee, the widow was to have the free presentation thereof, so as, upon a vacancy, to give it

<sup>1</sup> Glanv. lib. 6, c. 2.

<sup>2</sup> The word used by Glanville is *contradicere*, which, in this and other places, he seems to use in a sense implying something more formal and solemn than a common dissent and disapprobation.

<sup>3</sup> Glanv. lib. 6, c. 2.

<sup>4</sup> *Ibid.* c. 13.

<sup>5</sup> *Ibid.* c. 12.

to a clerk, but not to a college, because that would be depriving the heir of his right for ever; however, should the husband in his lifetime have presented a clerk, the presentee was to enjoy it during his life, though the presentation was made after the wife had been endowed of the land, and it might look like an anticipation and infringement of the profits and advantage to which she was entitled by her special assignment of dower. Yet, should the husband himself have given it to a religious house, as this would be an injury to the wife similar to that above stated respecting the heir, the church after his death was to be delivered back to the widow, that she might have free presentation to it; but after her death, and that of her clerk, the church would return back to the religious house to be possessed for ever.

If a woman had been separated from her husband *ob aliquam sui corporis turpitudinem*, or on account of blood and consanguinity, she could not claim her dower; and yet, in both these cases, the children of the marriage were considered as legitimate, and inheritable to their father (a). Sometimes a son and heir married a woman *ex consensu patris*, and gave her in dower some part of his father's land, by the assignment of the father himself. Glanville states a doubt upon this; whether in this case, any more than in that of an assignment by the husband himself, the widow could demand more than the particular land assigned; and whether, upon the death of the husband before the father, she could recover the land, and the father be bound to warrant her in the possession of it.<sup>1</sup>

Thus far of one sense of the word *dos*. It was understood differently in the Roman law, where it properly signified the portion which was given with the woman to her husband; which corresponds with what was commonly called in our law *maritagium*: but we shall defer saying anything of *maritagium* till we have considered the nature of alienation and descent, with some other properties of land.

Respecting the alienation of land, the first consideration that presents itself is the indulgence allowed in favour of gifts in *maritagium* (b). Every freeman, says Glanville, might give part of his land with his daughter, or with any other woman, in *maritagium*, whether he had an heir or not, and whether his heir agree to it or

(a) It is stated in the *Mirror* that it was ordained that knights' fees should come to the eldest son by succession, and that socage lands should be divisible among the right heirs, and that none might alien but the fourth part of his inheritance, without the consent of his heirs, nor his lands acquired by grant, if the power of alienation were not given; though this seems a mistake, for the law had always been that it was alienable, unless there was a restriction upon alienation. But after the time of John, the socage lands went to the eldest son, unless there was a *custom* to divide the land; therefore the above passage must have been written prior to that reign.

(b) This *marriagehood*, or *maritagium*, is what Littleton calls tenure, or frank-marriage, which, he avers, was by the common law, and by which a man, on the marriage of his daughter, gave to her husband land in fee simple (lib. iii. c. 2).

not; nay, though he made that solemn declaration of his dissent, which we have just seen had the effect of rendering an

**Alienation.** alienation of dower ineffectual and void.<sup>1</sup> A person might give part of his freehold *in remunerationem servi sui* (a), or to a religious place in free alms; so that, should such donation be followed by seisin, the land would remain to the donee and his heirs for ever, if an estate of that extent had been expressed by the donor; but if the gift was not followed by seisin, nothing could be recovered against the heir without his consent: for such an incomplete gift was considered by the law rather as a *nuda promissio* than a real donation. Thus then, on the above occasions, any one might, in his lifetime, give a reasonable part of his land to whomsoever he pleased; but the same permission was not granted to any one *in extremis*; lest men, wrought upon by a sudden impulse, at a time when they could not be supposed to have full possession of their reason, should make distributions of their inheritances highly detrimental to the interest and welfare of tenures. The presumption, therefore, of law in case of such gifts was, that the party was insane, and that the act was the result of such insanity, and not of cool deliberation. However, according to Glanville, even a *gift* made *in ultima voluntate* was good, if assented to and confirmed by the heir.<sup>2</sup>

In the alienation of land some distinctions were made between *hæreditas* and *quæstus*, land descended as an *inheritance*, and land acquired by *purchase*. If it was an inheritance, he might, as was said, give it to any of the before-mentioned purposes. But, on the other hand, if he had more sons than one who were *mulieratos*, that is, born in wedlock, he could not give any part of the inheritance to a younger son against the consent of the heir; for it might then happen, from the partiality often felt by parents towards their younger children, that, to enrich them, the eldest would be stripped of the inheritance. It was a question whether a person, having a lawful heir, might give part of the inheritance to a bastard son; for, if he could, a bastard would be in better condition than a younger son born in wedlock; and yet it should seem that the law allowed such donation to a bastard son.

If the person who wanted to make a donation was possessed only of land by *purchase*, he might make a gift, but not of all his pur-

(a) This was the tenure of bishoprics and benefices:—"Potent etiam donatio in liberam eleemosinam; sicut ecclesiis, cathedralibus conventualibus, parochialibus, viri, religiosi" (*Bracton*, lib. xxvii.) The reason, apparently, why Glanville, whom our author only translates and follows, mixed up the two subjects of gifts on marriage of a daughter with leases by last will, is apparently because, as had been the policy which allowed of gifts to children, *inter viros*, did not apply to bequests to strangers at the close of life, and especially *in articulo mortis*. Apparently there is not any connexion between the subjects, because to the extent to which land was allowed to be given to children, *inter viros*, there would be less to bequeath to any one. And as gifts in frank-marriage would be, as Lyttleton says, for the advancement of the daughters, there could be no objection to them on any ground.



chased land ; for he was not, even in this case, allowed entirely to disinherit his son and heir : though if he had no heir male or female of his own body, he might give all his purchased lands for ever ; and if he gave seisin thereof in his lifetime, no remote heir could invalidate the gift. Thus a man, in some cases, might give away, in his lifetime, all the land which he had himself purchased, but not, as in the civil law, make such donee his heir ; for, says Glanville, *solus Deus hæredem facere potest, non homo*.

If a man had lands both by inheritance and by purchase, then he might give all his purchased land to whomsoever he pleased, and afterwards might dispose of his lands by inheritance, in a reasonable way, as before stated. If a person had lands in free socage, and had more sons than one, who by law should inherit by equal portions, the father could not give to one of them, either out of lands purchased or inherited, more than that reasonable part which would belong to him by descent of his father's inheritance : but the father might give him his share.

We may here observe, that many questions of law arose, owing to certain consequences which sometimes resulted from this liberality of fathers towards their children. First, suppose a knight, or free-man, having four or more sons, all born of one mother, gave to his second son, to him and his heirs, a certain reasonable part of his inheritance, with the consent of the eldest son and heir (to avoid all objections to the gift), and seisin was had thereof by the son, who received the profits during his life, and died in such seisin, leaving behind him his father and all his brothers alive ; there was a great doubt among lawyers, in Glanville's time, who was the person by law entitled to succeed. The father contended, he was to retain to himself the seisin of his deceased son, thinking nothing more reasonable than that the land which was disposed of by his donation, should revert again to him. To this it might be answered by the eldest son, that the father's claim could not be supported ; for it was a rule of law *quòd nemo ejusdem tenementi simul potest esse hæres et dominus*,<sup>1</sup> that no one *Nemo potest esse hæres et dominus*. could be both heir and lord of the same land : and by the force of the same rule, the third son would deny that the land could revert to the eldest ; for as he was heir to the whole inheritance, he could not, as before said, be at once heir and lord ; for he would become lord of the whole inheritance upon the death of his father, and therefore stood very nearly in the predicament in which we just stated the father himself to be. Thus, as by law the land could not remain with him, there was no reason, says Glanville, why he should recover it ; and therefore, by the same reasoning it appeared

<sup>1</sup> In the times of Glanville and Bracton, the reservation of services might be made either to the feoffor, or to the lord of whom the feoffor held ; they seem more commonly to have been made in the former manner : thus every such new feoffment in fee made a new tenure, and of course created a new manor ; and so the law continued till stat. *quia emptores*, 18 Ed. I., required feoffments in fee to be made with reservation of the services to the chief lord.



to Glanville that the third son was to exclude all the other claimants.

A like doubt arose, when a brother gave to his younger brother and his heirs a part of his land, and the younger brother died without heirs of his body; upon which the elder took the land into his hands, as being vacant and within his fee, against whom his own two sons prayed an assize of the death of their uncle; in which plea the eldest son might plead against the father, and the younger son against his elder brother, as before mentioned. And here the law is stated by Glanville to be this: that the father could not by any means retain the land, because he could not *simul hæres esse dominus*; nor could it revert to the donor, with the homage necessarily incident to it, if the donee had any heir, either of his body or more remote. Again, land thus given, like other inheritances, naturally descended to the heir, but never ascended: from all of which it followed, that the plea as between the father and eldest son was at an end, as having no question in it; but that between the eldest and younger son went on, as before stated. And in this last case the king's court had taken it upon it to determine, *ex æquitate*, that the land so given should remain to the eldest son (particularly if he had no other fee) to hold till the paternal inheritance descended upon him; for while he was not yet lord of his paternal inheritance, the rule *quòd nemo ejusdem tenementi simul potest hæres esse et dominus*, could not be said to stand in the way. But then it might be asked, whether, when he became by succession lord of that part of the inheritance, he was not heir also of it, as well as of the rest of the inheritance, and then fell within the meaning of that rule? To this Glanville answers, that it was a thing not at first certain, whether the eldest son would be the heir, or not; for should the father die first, he most undoubtedly would be so; and then he would cease to be lawful owner of the land he had acquired by succession from the uncle, and it would revert to the younger son as right heir: yet if, on the other hand, the eldest son died first, then it was plain he was to be the heir of the father; and therefore these two requisites of this rule, namely, the *jus hæreditarium* and *dominium*, did not concur in the same person. Such is the reasoning of Glanville upon this curious point, in the law of descent, as understood in his time.<sup>1</sup>

There are two observations to be made respecting gifts of land, and then we shall proceed to consider the law of descent more fully. One is, that bishops and abbots, whose baronies were held by the eleemosynary gift of the king and his ancestors, could not make gifts of any part of their demesnes without the assent and confirmation of the king:<sup>2</sup> the other is, that the heirs of a donor were bound to warrant to the donee and his heirs the donation, and the thing thereby given.<sup>3</sup>

Having incidentally alluded to some rules which governed the

<sup>1</sup> Glanv. lib. 7, c. 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* c. 2.

descent of lands, it will now be proper to treat of the law of succession more at large. They divided heirs into those they called *proximi*, and those they considered as *remotiores*. Of descent.

*Proximi* were those begotten from the body, as sons and daughters: upon the failure of these, the *remotiores* were called in, as the *nepos* or *neptis*, the grandson or granddaughter, and so on, descending in a right line *in infinitum*; then the brother and sister, and their descendants; then the *avunculus*,<sup>1</sup> or uncle, as well on the part of the father as of the mother; and in like manner the *matertera*, or aunt; and their descendants. When therefore a person died leaving an inheritance, and having one son, it was a settled thing that the son succeeded to the whole. If he left more sons than one, then there was a difference between the case of a *knight*; that is, a tenant by *feodum militare*, or knight's service; and a *liber sokemannus*, or *free sokeman*. If he was a knight or tenant by military service, then, according to the law of England, the eldest son succeeded to the father *in totum*; and none of his brothers had any claim whatsoever. But if he was a free sokeman, and possessed of soccage-land that had been anciently divisible, then the inheritance was divided among all the sons by equal parts; saving always to the eldest son, as a mark of distinction, the capital messuage; so, however, as he made a proportionate satisfaction to the other brothers on that account. But if the land was not anciently divisible, then it was the custom, in some places, for the eldest son to take the whole inheritance; in some, the youngest son.

If a person left only a daughter, then what we have said of a son held good with regard to her. And it was a general rule, whether the father was a knight or a sokeman, that where there were more daughters than one, the inheritance should be divided among them; saving, however (as in the case of the son), the capital messuage to the eldest daughter. Where the inheritance was thus divisible between brothers or sisters, if one of them died without heirs of the body, the share of the party deceased was divided amongst the survivors. It was a rule, in these divisible inheritances, that the husband of the eldest daughter should do homage to the chief lord for the whole fee; the other daughters or their husbands being bound to do their services to the chief lord by the hand of the eldest, or her husband; and not to do homage or fealty to the husband of the eldest: nor were their heirs in the first or second descent; but those in the third descent from the younger daughters were bound by the law of the realm to do homage and pay a reasonable relief to the heir of the eldest daughter for their tenement. It was a rule, that no husbands should give away their wives' inheritance, or any part thereof, without the assent of their

<sup>1</sup> This is the expression used by Glanville; which is not strictly correct; *avunculus* and *matertera* being the uncle and aunt on the mother's side; as the uncle on the father's side was *patruus*. Indeed our author, after all, passes over this in a loose way.

heirs; nor could they release any right that might belong to their heirs.

We have said before, that if a person had a son and daughter, or daughters, the son succeeded *in totum*; and therefore, if a man had more wives than one, and had daughters from two, and at length a son from a third, this son would alone take the whole inheritance of his father; for it was a general rule, that a woman could never take part of an inheritance with a man,<sup>1</sup> unless, perhaps, by the particular and ancient customs of some cities or towns: yet if a man had more wives than one, and had daughters from each, they all succeeded alike to the inheritance, the same as if they had been born of the same mother.

Suppose a man died without leaving a son or a daughter, but had grandchildren, they succeeded in like manner as children; those in the right line being always preferred to those in the transverse. However, we have before seen,<sup>2</sup> that when a man left a younger son, and a grandson of his eldest son, who was dead, there was great difficulty in determining the succession in such case between the son and grandson. Some thought the younger son was more properly the right heir than the grandson; for the eldest son not having lived till he became heir, the younger son, by outliving both his brother and father, ought properly to be the father's successor. It seemed to others that the grandson should be preferred to the uncle; for as he was heir of the body of the eldest son, and, if he had lived, would have had all his father's rights, he, it was said, should more properly succeed in the place of his father: and so Glanville thought, provided the eldest son had not been *fores-familiated* by the grandfather. A son was said to be *foris-familiated*, if his father assigned him part of his land, and gave him seisin thereof, and did this at the request, or with the free consent of the son himself, who expressed himself satisfied with such portion; and it was clear law, that in such case the heirs of the son could not demand as against their uncle, or any one else, any more of the inheritance of the grandfather than what was so assigned to their father; though the father himself, had he survived the grandfather, might notwithstanding have claimed more. Where it happened, however, that the eldest son had in his father's lifetime done homage to the chief lord of the fee for his father's inheritance, as was not unfrequently the case, and died before his father, there it was held beyond question, that the son of such eldest son should be preferred to the uncle, although there had been a *foris-filiation*.

Such was the law of descent in Glanville's time; and this will very properly be followed by a short view of some of the duties incumbent on heirs; with the incidents of inheritance and succession; such as testaments, wardship, bastardy, and escheat.

<sup>1</sup> Glanville's words are, *mulier nunquam cum masculo partem capit in hæreditate aliquâ.*

<sup>2</sup> Vide ante, 160.

Heirs, says Glanville, were bound to observe the testaments made by their fathers, or their other ancestors to whom they were heirs, and to pay all their debts (a). For every freeman, not incumbered with debts beyond the amount of his effects, might, on his death-bed, make a reasonable division of his property, by will; so as he complied with the customs of the place where he lived; one of which commonly was, first, to remember his lord by his best and principal chattel; then the church; and after these, he might dispose of the remainder as he pleased. However the customs of particular places might lay this restriction upon wills, no person was bound, by the general law of the kingdom, to leave anything by will to any particular person, but was at liberty to act as he pleased; it being a rule of law that *ultima voluntas esset libera*. A woman who was *sui juris* might make a will; but if she was married, she could do nothing of this sort without her husband's authority, as it would be making a will of his goods. But Glanville thought it would be a proper testimony of affection and tenderness, for a husband to give to his wife *rationabilem divisam*, that is, a third part of his effects; this being what she would be entitled to, if she had survived him; and it seems that it was not unfrequent for husbands to give a sort of property to their wives in this third part, even during the coverture.

The passage in Glanville from which this and the following account of testaments is taken, throws great obscurity upon the subject, and lays a foundation for the doubt that long divided lawyers, and is not yet settled, respecting the power of making wills of chattels, at common law. After having expressly laid down, that by the general law of the kingdom no person was bound to leave anything by will to any particular person, and that the third part left to the wife was dictated rather by a moral than legal obligation, he goes on in the following remarkable words. "When a person," says he, "is about to make his will, if he has more than enough to pay his debts, then all his movables shall be divided into three equal parts; of which one shall go to the heir, another to the wife; the third be reserved to himself, over which he has the power of disposal as he pleases: if he dies without leaving a wife, a half is to be reserved to the testator" (b).<sup>1</sup> Thus far

(a) The author, it is to be again observed, merely follows and translates Granville (lib. vii. c. 5). It is to be observed, also here, that the author has omitted to explain that the *heirs* inherited chattels as well as lands as late as the time of Hen. II., and that the law was altered some time afterwards (Selden's *Title of Honour*, p. 2, c. 5, s. 21).

(b) This is in accordance with the custom of gavelkind, which is a relic of the old common law or custom of the Britons and Saxons. "Let the goods of gavelkind persons," says the Customal of Kent, "be divided into three parts, after the funeral and the debts paid, if there be lawful issue in life, so that the dead have one part, and the lawful sons and daughters another, and the wife the third; and if there be

<sup>1</sup> The progress of this doctrine, and the discussions upon it, will be related in the proper place.

respecting the law of testaments for the disposition of movables ; to which he adds, conformably with what we have before shown, that an inheritance could not be given by last will.<sup>1</sup>

A testament ought to be made in the presence of two or more lawful men, either clergy or lay, being such persons as might afterwards become proper witnesses thereto. The executors of a testament were such persons as the testator chose to appoint to undertake the charge of it. If the testator appointed none, the *propinqui et consanguinei*, by which were meant, as may be supposed, the nearest of kin to the deceased, might interpose ; and if there was any one, whether the heir or a stranger, who detained any effects of the deceased, such executors or next of kin might have the following writ directed to the sheriff, to cause a reasonable division of the effects to be made : *Rex vicecomiti salutem : præcipi tibi quodd justè et sine dilatione facias stare rationabilem divisam N. sicut rationabiliter monstrari poterit quodd eam fecerit, et quodd ipsa stare debeat, &c.*<sup>2</sup> If the person, summoned by authority of this writ, said anything against the validity of the testament ; that it was not properly made, or that the thing demanded was not bequeathed by it ; such inquiry was to be heard and determined in the court christian ; for all pleas of testaments, says Glanville, belong to the ecclesiastical judge, and are there decided upon by the testimony of those who were present at the making of the will (a).<sup>3</sup>

If a person was incumbered with debts, he could not make any disposition of his effects (except it was for payment of his debts) without the consent of the heir ; but if there was anything remaining over and above the payment of his debts, that residue was to be divided into three parts, as above mentioned ; and he might, says Glanville, make his will of the third part. Should the effects of the deceased not be sufficient to pay his debts, the heir was bound to make up the deficiency out of the inheritance which came to him ; so that we see the reason why, under such circumstances, the heir's consent was necessary towards a will. It seems,

no lawful issue in life, let the dead have one half and the wife the other half" (*Robinson on Gavelkind*, p. 287). Hale also recognises the doctrine in the text, which, it will be seen, is in accordance with the laws of the Saxons (*vide ante*). It is true that Bracton speaks of the custom of London as leaving a freeman at liberty to bequeath his property as he pleased, and Lord Coke misunderstood this as applying generally ; but in that he was in error (*Bracton*, book i.)

(a) We learn from this that the maxim had already become established which we find afterwards in Bracton, that pleas of freeholds could not be entertained without the king's writ. It was thus that the Conqueror sent down justiciaries by his writ to try cases as to freeholds in the county court, as in the case of the Archbishop of Canterbury. This was certainly an innovation, for the county court was originally the only jurisdiction for all cases. It is manifest that by the time of Glanville the above-mentioned maxim had become established. And so in Bracton it is stated that the sheriff exercised jurisdiction in many cases which did not belong to him *ex officio* ; but that in such cases he acted, not as sheriff, but as *justiciarius Regis* (154). The importance of this principle can be easily understood ; carried out, it effected a complete revolution in our judicature.

<sup>1</sup> Glanv. lib. 7, c. 5.

<sup>2</sup> *Ibid.* c. 6, 7.

<sup>3</sup> *Ibid.* c. 8.

however, that the heir was not bound to make up this deficiency, unless he was of age.<sup>1</sup>

Heirs were considered in different lights, according as they were of full age, or not. An heir of full age might hold himself in possession of the inheritance immediately upon the death of the ancestor; and the lord, though he might take the fee together with the heir into his hands, was to do it with such moderation as not to cause any disseisin to the heir; for the heir might resist any violence, provided he was ready to pay his relief and do the other services. Where the heir to a tenant holding by military service was under age, he was to be in custody of his lord till he attained his full age; which in such tenure was when he had completed the twenty-first year. The son and heir of a sokeman was considered as of age when he had completed his fifteenth year: the son of a burgess, or one holding in burgage tenure, was esteemed of age, says Glanville, when he could count money and measure cloth, and do all his father's business with skill and readiness. The lord, when he had custody of the son and heir, and of his fee, had thereby, to a certain degree, the full disposal thereof; that is, he might, during the custody, present to churches, have the marriage of women, and take all other profits and incidents which belonged to the minor and his estate, the same as he might in his own; only he could make no alienation which would affect the inheritance. The heir was, in the meantime, to be maintained with a provision suitable to his estate; the debts of the deceased were to be paid in proportion to the estate and time it was in custody of the lord (a), who was not by such liens to be entirely deprived of his benefit by the custody: with that qualification, however, lords were bound *de jure* to answer for debts of the ancestor.

The lord also, as he had all emoluments belonging to the heir, was to act in all his concerns, and prosecute all suits for recovery of his rights, where such suits were not delayed by the usual exception to the infancy of the party. But the lord was not bound to answer for the heir, neither upon a question of right, or of seisin, except only in one case; and that was, where there had fallen to the heir, since his father's death, the custody of some minor: for then, if the minor came of age, and the inheritance was not delivered to him, he was entitled to have an assize and recognition

(a) What Glanville says is, that the lord is to discharge the debts, so far as the estate and the length of the custody will admit—that is, as far as the proceeds of the estate, deducting the expenses of maintenance, would admit of. The qualification here added by our author is without authority. The general doctrine of Glanville is confirmed by the *Mirror*. “Every guardian is answerable for three things—1. That he maintain the infant sufficiently; 2. That he maintain his rights and inheritance without waste; 3. That he answer and give satisfaction of the trespasses done by the infant (*Mirror*, c. 5, s. 1; *Bracton*, 87, a; *Reg. Mag.* l. 2, c. 62; and *Le Grand Cust. Nor.* 333).

<sup>1</sup> Glanv. lib. 7, c. 8.

*de morte antecessoris*: and in this case, as the recognition was not by law to remain, on account of the infancy of the heir, his lord was to answer for him. If a minor was appealed of felony, he was to be attached by safe and sure pledges; but yet he was not bound to answer to the appeal till he was of age.<sup>1</sup> It was the duty of those who had the custody of heirs and their fees, to restore the inheritance to the heir in good condition, and also free from debts; in proportion, as was before said, to the size of the inheritance, and to the time it was in custody.<sup>2</sup> If there was any doubt whether an heir was of age or not, yet still the lord had the custody of the heir and his estate until he was proved to be of age by lawful men of the vicinage, upon their oaths.

If an heir within age had more lords than one, the chief lord, that is, he to whom he owed allegiance for his first fee, was to have the preference of the custody: an heir, however, so circumstanced, was still to pay to the lords of his other fees their reliefs, and other services. In the case of a holding of the king *in capite*, the custody belonged to the king completely and fully, whether the heir held of other lords or not: for the maxim was *dominus rex nulum habere potest parem, multò minus superiorem*. But in burgage-tenure the king had not this preference to other lords. The king might commit to any one such custodies as belonged to him (a); and they were committed sometimes *pleno jure*, and sometimes not. In the latter case, the committee was to render an account thereof at the exchequer; in the former, not: in the former case, he might present to churches, and do other acts, as he might in his own estate.<sup>3</sup>

This was the law concerning the custody of heirs, in military tenure. The heirs of *sokemen*, upon the death of their ancestors, were, according to Glanville, to be in the custody of their *consanguinei propinqui*, which must mean, as in a former passage, the next of kin; with this qualification, that if the inheritance descended *ex parte patris*, the custody belonged to the descendants *ex parte matris*; and so *vice versâ*. For the opinion was, that the custody of a person should not, by law, belong to one who, standing near the succession, might be suspected of having views upon the inheritance.<sup>4</sup>

We shall next speak of the custody of *female heirs*. If a woman

(a) This is not said by Glanville, who only suggests it was done. "If the king should commit the custody to another, then the distinction will arise which is next adverted to. It appears, as Lord Littleton states, that the wardships of the crown were sold by Henry II., and mention is made, he says, of the practice, without any blame, in the charters of Henry III. and John (*Hist. Hen. II. and III.*, f. 109). He, however, explains that, by his statement that the other lords did the same, and they were the promoters of the charters. There can be no doubt that it was a vicious and pernicious practice, entirely contrary to legal principle, for the office of guardian is essentially a matter of personal trust and confidence.

<sup>1</sup> Glanv. lib. 7, c. 9.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* c. 10.

<sup>4</sup> *Ibid.* c. 11.

was a minor, she was to be in the custody of her lord till she became of full age (*a*), and then the lord was bound to find her a proper marriage. If there were more than one, he was to deliver to each her reasonable portion of the inheritance. If a woman was of full age, then also she was to be in the custody of her lord till she was married by his advice and disposal; for it was the law and custom of the realm, that no woman who was heir to land should be married but by the disposal and assent of her lord (*b*): and this rule operated so far, that if any one married his daughter, who was to be his heiress, without the assent of his lord, he was by strictness of law to be for ever deprived of his inheritance; nor could he retain it but by the mercy and pleasure of the lord. Nevertheless, when such a person applied to the lord for licence to marry his daughter, the lord was bound to give his consent, or show some reasonable cause to the contrary: if not, the father might even proceed to marry her according to his own wish and inclination, without the lord's concurrence.

Upon this subject of marrying women, Glanville puts a case: Whether a woman possessed of land in dower might marry as she pleased, without the assent of her *warrantor*, that is, the heir of her husband; and whether by so doing she would lose her whole dower? Some thought she ought not to lose her dower, because such second husband was not by the law and custom of the land bound to do *homage* to the warrantor, but only a simple *fealty*; which was merely, in case the wife should die before the husband, to preserve the homage from being entirely lost, for want of some outward mark of tenure. But notwithstanding that, Glanville thought she was bound to obtain the assent of her warrantor, or lose her dower, unless she had other lands, either by *maritagium* or by inheritance; for then it was sufficient if she had the assent of the chief lord: and this was on account of the simple fealty only which the husband was bound to do to the lord. If the inheritance was held of more than one lord, it was sufficient to obtain the assent of the chief lord.<sup>1</sup>

If women, while in custody of their lords, did anything which was a cause of forfeiture (*c*), and this was made out against them in a lawful way, the offender lost her right to the inheritance, and

(*a*) This was fourteen (*Bracton*, 86, b; *Year book*, 8 *Edw. IV.*, 7).

(*b*) This was, Glanville says, only lest he should be compelled to receive an enemy or improper person as tenant, *i.e.*, military tenant, for all this applied only to military tenures. Lord Littleton indeed thought the reason applied to all fiefs for which homage was done, as well as to those held by knight-service (*Hist. Hen. II. and III.*, 104); but it is conceived that it is not so. Henry I. in his charter promised that he would take nothing for his consent, nor withhold it, unless it were proposed to unite the ward to his enemy (*Leges Henrici Primi*, c. 2, s. 3). It appears plainly that this usage applied only to female heirs, though it was afterwards, abusively, extended to male wards; and even after *Magna Charta*, on a forced construction of the words, "*Heredes mantentur sine disparagatione*."

(*c*) "*De corporibus suis forisfecerent*;" that is, forfeited through incontinence: Lord Littleton observes "that this was a severe punishment for the frailty of a single

<sup>1</sup> Glanv. lib. 7, c. 12.



her share accrued to the rest; but if they had all incurred a forfeiture, then the whole inheritance fell to the lord, as an *escheat*.

Widows were not to be again in custody of their warrantors, though, as has been already related, they were to have their assent before they married. Women were not to forfeit their inheritance on account of any incontinence: not that the maxim, *putagium hæreditatem non adimit*, meant this indemnity of women in case of incontinence, for that was to be understood of the consideration the law had of a son begotten under such circumstances, and born after lawful wedlock; who was thereby intitled to succeed to the inheritance as a lawful heir; according to another rule, *filius hæres legitimus est, quem nuptiæ demonstrant*.<sup>1</sup>

This brings us to consider the law of legitimacy. It was held, that no *bastardus*,<sup>2</sup> or bastard was a legitimate or lawful heir, nor any one not born in lawful wedlock. If any one claimed an inheritance as heir, and it was objected that he was not heir, because he was not born in lawful wedlock; then the plea ceased in the king's court, and it was commanded to the archbishop or bishop, whichever it might be, to make inquiry of the marriage, and to signify to the king, or his justices, his judgment thereon; for which purpose there issued a writ to the following effect: *Rex episcopo salutem: Veniens coram me W. in curiâ meâ petit versus R. fratrem suum quartam partem fœdi unius militis in villâ, &c., sicut jus suum; et in quo idem R. jus non habet, ut W. dicit, eò quòd ipse bastardus sit, natus ante matrimonium matris ipsorum. Et quoniam ad curiam meam non spectat agnoscere de bastardiâ, eos ad vos mitto, mandans ut in curiâ christianitatis inde factatis quod ad vos speciat. Et cùm loquela illa debitum coram vobis finem sortita fuerit, mihi literis vestris significetis, quid inde coram vobis actum fuerit, &c.*<sup>3</sup>

Upon the subject of legitimacy, there was this curious question: If a person was born before his father married his mother, whether, after the marriage, such child was to be considered as a lawful heir? And Glanville says, that though by the canons and Roman law (meaning a law of Justinian adopted in a constitution made in the time of Pope Alexander III. about thirty years before) such a child was a lawful heir; yet by the law and custom of this realm

woman, and without example in other laws; but it undoubtedly arose not so much from a rigorous sense of the heinousness of the fault, as from the notion of an advantage due to the lord from the marriage of his ward, which he probably might be deprived of by her being dishonoured" (3 *Hist. Hen. II.*, 119). But a little consideration of the character of the Norman sovereigns may suggest the suspicion that this, which was obviously an indecent encroachment, and an oppressive and abusive exaction, was rather continued with the view of their profiting by the seduction of their wards, to rob them of their lands. Instances of conduct like this in their histories are not infrequent, and Mackintosh hints at it in the reign of John.

<sup>1</sup> Glanv. lib. 7, c. 12.

<sup>2</sup> In German *bastart*; from *bas*, says Spelman, which signifies *infimus*, and metaphorically *spurius*, *impurus*; and *start*, which signifies *ortus*, or *editus*. So we say in English *upstart*; as it were, *subito exortus*. Vide Spelm. voce *Bastardus*.

<sup>3</sup> Glanv. lib. 7, c. 13, 14.

he was not to be received as an heir, to hold or claim any inheritance (*a*). The question, whether born before or after marriage, we have seen, was examined before the ecclesiastical judge, whose judgment was to be reported to the king or his justices; but when the spiritual judge had certified the answer to that question, the king's court made use of it as it pleased, and denied or adjudged the inheritance in dispute to either party, according to its own rule of determination: so that the ecclesiastical court only answered whether the party was born before or after marriage; the king's court determined *who* was heir.<sup>1</sup>

As a bastard could have no heir but of his body, this gave occasion to a very particular question of inheritance and succession. If a person made a gift of land to a bastard, reserving a service or anything else, and received homage, and the bastard died in seisin of the land, without leaving any heir of his body, it was a doubt in Glanville's time, who was to succeed to the land; it being clearly held that the lord could not; though it was determined, that if a bastard died without a will, his goods went to his lord; and if he held of more than one, each was to take that which was found within his fee.<sup>2</sup>

It may be remarked here, that all the effects of an usurer, whether he made a will or not, belonged to the king: this was meant as a penalty upon usury, after the death of the party; for in his lifetime he could not be proceeded against criminally. Among other inquisitions which used to be made for the king, one used to be made of a person dying in this offence (for so it was called) by twelve lawful men of the vicinage, upon their oaths: and if it was proved, all the movables and chattels of the deceased usurer were taken for the king's use; his heir was disinherited; and the land

Usurers.

(*a*) Lord Littleton observes upon this that it shows the entire independence of the law of England on the canon and civil law at this time (3 *Hist. Hen. II.*, p. 125). No one ever supposed that the Roman law, *proprio vigore*, bound this country; but, as Selden put it, *Valet pro ratione non pro inducto jure*. And the question is, whether the Roman law was not in this, as in every other instance in which ours departed from it, right. There can be no doubt that in this country, in which the law had been mainly customary, and the spirit of insular independence, or perhaps prejudice, arising from ignorance, was so strong; it was this spirit, rather than reason which dictated an adherence to the national customs, often senseless, and vicious, and pernicious, and probably of very recent introduction. Thus it was that Henry II. talked of his "customs," which had simply risen up under the Conqueror and his sons, and were so bad that even one of them himself declared them bad (*Leges Henrici Primi*, 1). And so it was with the custom that only those born in matrimony should inherit; as the Roman law was otherwise, and had been recognised here for centuries, there can be no doubt that our law had been in accordance with it, especially as it was so in the Grand Customary of Normandy (c. 27). When, therefore, in the reign of Henry III. it was proposed to assimilate our law to that of Europe, the reply of the barons, "*Nolumus quod noluist leges Angliæ mutari, quæ hucusque usitatæ sunt et approbatæ*," a reply so much vaunted as a proof of patriotism; it was simply an evidence of pride, the result of prejudice, and prejudice, the result of ignorance. For that beyond all doubt the Roman law is the sounder is shown by modern law, as well as by ancient usage. The French code allows, under certain restrictions, the subsequent legitimization of children (*Code Nap.*, s. 331, 332).

<sup>1</sup> Glanv. lib. 7, c. 15.

<sup>2</sup> *Ibid.* c. 16.

reverted to the lord. If a person had been notoriously guilty of usury, but had desisted from the practice, and died a penitent, his property was not to be treated as the property of an usurer. The point therefore was, whether a man *died* an usurer; and only in such case could his effects be confiscated.<sup>1</sup>

To finish the subject of descent to heirs; it must be remarked, that next after those we have mentioned, the *ultimus hæres*, if he could be so called, of every man was his lord: for when a person died without a certain heir,<sup>2</sup> the lord of the fee might, of right, take into his hands and retain the fee, whether such lord was the king or any other person. Nevertheless, should any one afterwards come and say he was the right heir, he might, either by the grace of the lord, or at least by the king's writ, be let in to sue for the inheritance, and make his claim out in court; yet in the meantime, the land remained in the lord's hands; it being a rule, that when a lord had any doubt about the true heir to his tenant, he might hold the land till that was made out in due form of law. This was like what we have seen was done, when there was a doubt whether an heir was of age or not; with this difference, that in this case the land, in the meantime, was considered as an escheat, which was to all intents and purposes the absolute property of the lord; in the other, it was not looked upon as his own, but only as *de custodia*.

Lands reverted to the lord by escheat, not only on failure of heirs, but by various causes of *forfeiture*. If any one was convicted of felony, or confessed it in court, he lost his inheritance by the law of the land, and it went to his lord as an escheat. Where a person held of the king *in capite*, in such case, as well his land as his movables and chattels, wherever they were found, were taken for the king's use. Again, if an outlaw, or one convicted of felony, held of any one but the king, then also all his movables belonged to the king, and his land was to remain in the king's hands for a year; but at the expiration of that time, it was to revert to the lord of the fee: this, however, was *cum domorum subversione et arborum extirpatione*, that is, according to the barbarous and unwise policy of those days, not till the king had first subverted all the houses, and extirpated all the trees thereon.

In short, when a judgment passed in court, that a man should be *exhæredatus*, his inheritance reverted to the lord of the fee, as

<sup>1</sup> Glanv. lib. 7, c. 17.

<sup>2</sup> This law of *ultimus hæres*, laid down so generally by Glanville, is said by himself, just before, not to take place where a bastard died without heirs of his body. The reason of this exception to the analogy of tenures does not appear. In cases of forfeiture where the goods even went to the king, yet the land escheated to the lord. We shall see, that in the time of Bracton, the land, in this case of bastardy, escheated to the lord, and so it does at this day.

It is worthy of remark, that in Scotland, where feudal rights were in general more regarded than in England, the lord has long been deprived of this casualty, and the king is considered as the *ultimus hæres* not only of the bastard, but in all cases of failure of heirs; upon the principle, *quod nullius est, cedit domino regi*. 2 Blackst. 249; Ersk. Prin. b. iii. tit. 10.

an escheat. If any one was condemned for theft his movables and chattels went to the sheriff of the county; but the lord of the fee took the land without waiting the year, as in the former case, because theft was not an offence against the king's crown, as robbery and homicide were. When any one was regularly and legally outlawed, he forfeited his lands; and though he was afterwards restored by the king's pardon, neither he nor his heirs could, by reason of such pardon, recover the land once forfeited, against the lord; for notwithstanding the king remitted the pains of forfeiture and outlawry as far as regarded himself, he could not thereby infringe the rights of others.<sup>1</sup>

It was to illustrate the title of *maritagium* that we were at first led into this long digression about the law of descent, legitimacy, and escheat: to that we now return; and shall conclude what is to be said upon it, by speaking of the tenure by which a tenant *in maritagio* held his estate.

Maritagium was of two kinds: one was called *liberum* or free; the other, *servitio obnoxium*, liable to the usual services. *Liberum maritagium* was when a freeman Maritagium. gave part of his land with a woman in marriage, quit and freed from him and his heirs of all service towards the chief lord. Land so given enjoyed this immunity as low down as to the third heir; and during that time no homage was to be done: but after the third heir was dead, the land became subject to its old services, and homage was again to be done for it. If land was given *in maritagium servitio obnoxium*, that is, with a reservation of the legal services; in that case, the husband of the woman and his heirs, down to the third, were to perform that service, but yet without doing any homage; but the third heir, says Glanville, was to do homage for the first time, and so were all his heirs for ever after; though, in case of *liberum maritagium*, we have seen that homage was not to be done till after the third heir was dead. In all these cases, however, where no homage was done, yet a fealty was to be performed by the woman and her heirs, either by solemn promise or by oath, almost in the same form and words in which homage was done.

When a man having land given him *in maritagium* with a woman, had by that woman an heir born, whether male or female, who was heard to cry within four walls, *clamantem et auditum infra quatuor parietes* (a), as they expressed it, and survived his wife; then, whether the heir lived or not, the *maritagium* remained to the husband during his life, and after his death reverted to the donor or his heirs: but if he had no heir of his wife, then the

(a) The *Mirror* states that Henry I. ordained that if the husband survived the wife in such cases, and had issue, he should enjoy the land for life. This was what was called the "courtesy of England." It has long since been limited to life; and, on the other hand, the condition here mentioned of the child being heard to cry has long since been done away with, as it was only evidence of the child being born (*Littleton*, 29, f. 1). But settlements usually provide for such contingencies.

<sup>1</sup> Glanv. lib. 7, c. 17.

*maritagium* reverted to the donor or his heirs, immediately upon her death (a). And this was a sort of reason why homage was not usually received for these *maritagia*. For when land was given in any way, and homage was received for it, the effect of homage was such that the land could not, by law, return to the donor or his heirs; which would be contrary to the intention of these gifts in *maritagium*. If the woman who had land thus given in *maritagium* had survived her husband, and married a second, the law was the same as to his retaining the land in case he survived, whether the first husband left an heir or not.<sup>1</sup>

If land was to be claimed either by the wife or her heir, as having been given in *maritagium*, there was a difference between such a claim when against the donor and his heirs, and when against a stranger. If it was against the donor and his heirs, then it might be in the election of the demandant to sue in the court christian, or in the secular court. For questions of *maritagium* were considered as belonging to the ecclesiastical judge, if the demandant pleased to resort to him, on account of the mutual promises made by the man and woman at the time of the espousals. But if the suit was against a stranger, then it was to be determined in the lay court, in the same way as other suits about lay-fees. It must be observed, that such a suit, like a plea of dower, was not to be conducted without the presence of the warrantor; and as far as concerned the warrantor, everything was to be ordered as in an action for dower; all which will be made plain when we come to speak of that proceeding: only this must be remembered, that the third heir, after he had performed his homage, might go on with the suit without the authority of his warrantor.<sup>2</sup>

The subject of homage and relief deserves further consideration, and will properly enough follow what has just been said (b). Upon the death of the father or other ancestor, the lord of the fee was to receive the homage of the right heir

(a) Here we see the nature of trial by jury, originally as a trial by witnesses, and, therefore, by persons brought from the vicinage, in order that they might have knowledge of the matter. "Vicinetum" is derived from vicinus, and signifieth neighbourhood, or place near at hand, or neighbouring place. And the reason wherefore the jury must be of the neighbourhood, is for that vicinus (facta vicini præsumitur scire), (*Littleton*, 158). The writ to summon the jurors, therefore, on the same principle directed the sheriff to summon, "homines de vicineto qui melius veritatem sciunt," *vide post*. Therefore it was necessary that there should be a *venue* laid for every triable material fact, and the venue should be the vill; and it was necessary that there should be some hundredors on the jury, and the panel could be set aside for want of hundredors, until the act 4 Anne, c. 16, for amendment of the law. So tenacious is legal usage.

(b) The reason of homage, says Spelman, was to preserve the memory of the tenure and of the duty of the tenant, by making every new tenant at his entry to recognise the interest of his lord, lest that the feud, being now hereditary, and new heirs succeeding to it, they might by little and little forget their duty, and subtracting those services, at last deny the tenure itself (Spelman, *Reliq.*, 34). Skene considers that homage especially concerned service in war (de verb signi ad voc homagium). For this reason he observes that consecrated bishops did no homage. This view is also adopted by Cowell, and applied to explain the absence of homage by women.

<sup>1</sup> Glanville, lib. 7, c. 18.

<sup>2</sup> *Ibid.*

whether he was of age or not, so as the heir was a male; for women could, by law, do no homage (*a*), though they sometimes used to do fealty; yet, when they are married, their husbands were to do homage for them, in cases where it was due for the fee they held. If a male heir was a minor, the lord could not have custody of the fee nor of the heir till he had received homage; it being a general rule, that a lord could demand no service, relief, or anything else from the heir, whether he was of age or not, till he had received homage for the fee in respect of which he claimed such relief or service; and this was on account of the protection the heir could claim of his lord after homage, but not before. A person might do homage to different lords for different fees; but one of these was to be the chief homage, and distinguished above the rest by being accompanied, says Glanville, with allegiance; <sup>1</sup> which was to be performed to that lord of whom the homager held his chief freehold.

Homage was to be done in this way: the person was to profess, that "he became *homo domini sui*, the man of his lord, to bear him faith for the tenement in respect of which he did homage; to preserve his terrene honour in all things, saving only the faith he owed to the king and his heirs." From this it is clear, that it would be a breach of faith and of homage for a vassal to do anything to the damage of the lord, <sup>2</sup> unless in his own defence, or at the command of the king, when his lord had taken up arms against his sovereign lord the king: and, in general, it would be a breach of faith and of homage to do anything *ad exheredationem domini sui, vel dedecus corporis sui*. If then several lords, to each of whom a tenant had done homage, should make war on each other, it was the tenant's duty to obey the commands of his chief lord, and to go with him in person, if he required it, against any of the rest; notwithstanding which, in all other respects, the services owing to

The form of homage, "I become your man in life, and limb, and earthly worship," rather supports this view. It was, moreover, feudal; and feudality must have been military. And homage was only done for estates in fee-simple, for which reason it ceased when the feudal system became obsolete, and freehold lands became allodial. The only approach to it in leasehold lands is the fealty to the lessor's title.

(*a*) So Glanville says, but either it is a mistake, or the law had been altered, for in the reign of Edward III. women did do homage, whether single or married, for lands belonging to her, although the form was different. Littleton says,—“If a woman sole shall make homage unto her lord, she shall not say, ‘I become your woman,’ for that is not convenient for a woman to say, that she shall become the woman to any one, but only her husband when she is wedded. But she shall say, I make to you homage, to you shall be true and faithful, ‘for the tenements I hold of you.’” And he also cites a case, in the reign of Edward III., in which a man and his wife did homage and fealty for lands of the wife’s. “We do you homage, and faith to you shall bear, for the tenements which we hold of you,” &c., the lord holding their hands jointly between his, and they afterwards kissing him, and, afterwards, the book (*Ibid.* ii. c. 1). Lord Littleton thinks that Glanville was right, and that the usage was afterwards altered (3 *Hist. Henry II.*, 339), observing that bishops did no homage, the reason for which was, that they owed no feudal service.

<sup>1</sup> *Cum ligeanciâ factum.*

<sup>2</sup> *Dominum suum infestare.*

such other lords were still to be duly rendered by the tenant. The penalty of doing anything to the disherison of a lord, was for the tenant and his heirs to lose, for ever, the fee held of him: the same, if the tenant put violent hands upon him, to hurt or do him any atrocious injury.<sup>1</sup>

Glanville makes it a question, whether a tenant could be put to answer in his lord's court for default in any of the above particulars, and whether the lord could *distrain* him, by judgment of his court, without the command of the king or his justices; or without the king's writ, or that of his chief justice. And he thought that the law allowed a lord, by the judgment of his court, to call upon and distrain his homager to come to his court; and if the homager could not purge himself against the charge of his lord *tertiâ manu*, by three persons, or as many more as the court might require, he should be *in misericordiâ domini* to the amount of the whole fee he held of him. Glanville puts another question; whether a lord could distrain his homager to appear in his court to answer for the service of which the lord complained he deforced him, or made default in payment; and he thought that the lord might, without the command of the king or his justices; and that in such a proceeding the lord and his homager might come to the duel, or the great assize, by means of any one of the *pares* who chose to make himself a witness that he had seen the tenant or his ancestors do to the lord and his ancestors the service in dispute, which he was ready to *deraign* or prove; and that if the tenant was in this manner convicted, judgment should be for him to lose the whole fee which he held of the lord. Where a lord found he could not in this manner *justitiare*, or compel his tenant to appear in his court, he was obliged to resort to the process of the *curia regis*; <sup>2</sup> that is, to the command or writ of the king, or his justices.

Homage might be done by every freeman, as well those within age as those who were of full age, whether clergy or lay. Yet bishops consecrated, could not do homage to the king, though they held their bishoprics as baronies (*a*), but only fealty; and this

(a) This is a departure from Glanville. What he says is, that consecrated bishops are not in the habit of doing homage to the king, *even for their baronies*, "but merely fealty." And as they were not compelled to do homage before consecration, they were not bound to more than fealty. This would be so, the feudal system being military, and the reason of homage being to preserve the service, they could not be bound to it, because they were not bound to render any earthly service. Glanville says elsewhere, they held in frank-almoigne (lib. iii. c. 1), and Littleton says that tenants in frank-almoigne owed no earthly service (c. vi.) Therefore they could, it is obvious, owe no homage. Lord Littleton says,—"Pope Paschal II. allowed bishops elect to do homage and take the oath of fealty before they were consecrated. This was confirmed by the constitutions of Clarendon, and from the words of Glanville it appears that about the end of Henry II.'s reign, homage was done by bishops elect. But he tells us that after they were consecrated, they took the oath of fealty. This was a material difference from what was settled by the constitutions of Clarendon; and it is surprising that we have no account of it in the history of the

<sup>1</sup> Glanv. lib. 9, c. 1.

*Ibid.*



they performed with an oath. It was usual for bishops elect to do homage before their consecration.<sup>1</sup>

It is to be understood, that homage was not a mere personal thing. It was done in respect of some benefit derived from property or possession. It was due in respect of lands, tenements, services, rents in certain, whether in money or other things; but without some of these causes no homage was due to a lord, though it might be due to the king. Again, homage was not due in respect of all lands; for it was not due on account of dower, nor free marriage, nor from the eldest sister on account of the fees of younger sisters, till after the third descent; nor of a fee given in free alms.<sup>2</sup>

Homage might be received by any free man or woman, whether of age or not, as well clergy as lay. If homage had been done to a woman, and she married, it was to be done over again to the husband; yet, in a case somewhat similar, namely, when a person, by a final concord made in court recovered land for which a relief had been paid to the chief lord, it was a question, whether the person recovering was bound to pay a relief, upon his coming into possession thereof.<sup>3</sup>

In consequence of homage being performed, there arose a mutual relation between the parties; according to the rule, *quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio; præter solam reverentiam*. Therefore, when land was given for the service and homage of the tenant, and any one afterwards instituted a suit for that land, the lord was bound to warrant it to him, or to give him in lieu thereof *competens excambium*, an equivalent in value.

When an heir who had been in custody came of age, the inheritance times" (3 *Hist. Henry II.*, 113). What Glanville says is, not that bishops were accustomed to do fealty after consecration, but that they were not in the habit of doing more than that after consecration. The statement which Glanville adds, that it was "usual for the bishops elect to do homage," is to be taken with some suspicion, as the statement of the king's chief justiciary, not long after a protracted controversy with the archbishop on the subject. Sir J. Mackintosh, alluding to the contest on the subject of investitures between Henry I. and Anselm, a former archbishop, says, the controversy was adjusted as it had been in Germany, by settling that the monarch should invest the bishop elect with his temporalities, by touching him with the sceptre, (*Hist. of England*, vol. i.); and says that the article in the constitutions of Clarendon which related to the subject, followed the spirit of that compromise, although he allows that it might be historically untrue to allege the customs set up by those constitutions to be ancient (*Ibid.*) The text of the arrangement may be seen in Labbe's Councils, vol. x. p. 90. Ducange defines investiture as the conferring or giving possession of a fief or property by a suzerain lord to his vassal, (*Gloss. verb. Investiture*). This definition shows that it could not apply to bishops who were not feudal vassals. Homage properly preceded investiture, (*Ducange Gloss. verb. Hominum*). Homage, therefore, was incident to investiture, and the main contest was about investiture, to which homage was only an incident. But for this one reason it was a part of the great question of investiture, and the chief justiciary of Henry II. would, of course, put the case as strongly as he could for the royal cause. The popes never objected to investiture by the sceptre; what they objected to was investiture by the cross and ring, the symbols of the *spirituality*.

<sup>1</sup> Glanv. lib. 9, c. 1.

<sup>2</sup> *Ibid.* c. 2.

<sup>3</sup> *Ibid.* c. 3.



ance was restored to him without paying a relief; that being remitted in consideration of the profit the lord had derived from the custody. A female heir, whether of age or not, was continued in custody till she was married by the advice of her lord. If she had been within age when she first came into the lord's custody, then upon her marriage the inheritance was quit of all relief; but if she was of age when she first came into the lord's custody, though she continued some time in custody before marriage, yet her husband was to pay relief upon the marriage; and a relief once paid by the husband, was an acquittal both to husband and wife, during their several lives, for any relief on account of the inheritance: so that neither the wife nor her second husband, if she had one, nor the first husband, should he survive her, could be called upon to pay any relief.<sup>1</sup>

If the male heir was of age when his ancestor died, and was well known to be the heir, he might hold himself in the inheritance even against the will of the lord, as we before said; provided he made a tender of his homage, and a reasonable relief, in the presence of credible persons.

The relief of one knight's fee, according to the custom of the realm, was said to be reasonable at a hundred shillings. The relief in soccage-tenure was one year's value of the land. As to baronies, nothing certain was fixed concerning their relief; but the relief they were to pay was measured by the pleasure and mercy of the king alone, to whom it was due (*a*). The law was the same in serjeanties.<sup>2</sup>

When the lord and the heir had come to an agreement respecting what was to be paid for relief, the heir might exact reasonable aids from *his* homagers; always proportioning this demand to their circumstances, and the size of their fees; that it might not become such a grievous imposition as would entirely destroy their *contenement*, or, to use an English term which has been formed from it, their *countenance*, and appearance in the world: and no other measure was settled for ascertaining these aids but this regard to facts and circumstances. With the above precautions, a lord, in other cases, might exact similar aids of his tenants; as when he made his son and heir a knight, or when he married his eldest daughter. Glanville made a question, whether

(*a*) So far from this being the law, though it is so laid down by Glanville, that Henry I. in his charter describes it as one of the *malas consuetudines*, by which, under the Conqueror and his successors, the country had been oppressed, "*quibus regnum opprimebantur*." "*Si quis baronum meorum comitum sive aliorum qui de 'me tenent,' mortuus fuerit, hæres suus non redimet terram suam sicut faciebat tempore patris mei sed legitime et justa relevacione relevabit eum*," (*Leg. Hen. Pri. II.*) The law, therefore, was, that the relief must be *reasonable*, and the chief justiciary goes on to say so, in a passage omitted by the author, to the effect that if the lord would not accept reasonable relief, he had a remedy by a certain proceeding he describes. The law was reasserted in Magna Charter, c. ii.

<sup>1</sup> Glanv. lib. 9, c. 3.

<sup>2</sup> *Ibid.* c. 4.

lords could demand these aids of their tenants to enable them to carry on their wars? The practice, at least, was for them never to attempt to distrain for aids on this occasion, but to leave them to the voluntary generosity of their tenants. For the other aids, so long as they were reasonable, lords might, by judgment of their courts, without the *precept* or command of the king or his chief justice, distrain their tenants by the chattels that were to be found on their fees, or, if need were, by the fees themselves; so, however, that the proceeding was had regularly by the judgment of the court, and consistent with the reasonable custom thereof. If a lord could distrain his tenants for payment of these reasonable aids, much more, says Glanville, might he make distress for payment of his relief, and for such service as was due to him on account of the fee.<sup>1</sup> Thus we see the remedy by distress had, in Glanville's time, become a process first against the chattels; and only *si opus fuerit*, was there recourse to the fee itself; though it is probable, that in the origin of this summary method of compelling tenants to do their services, it was usual to take the whole fee into the lord's hands as a forfeiture, to enable him to do that justice to himself which his tenant refused; but this rigorous proceeding was by degrees softened down to one against the movables; and only in default of them, against the land.

Having taken this view of the nature of tenures and estates, it seems necessary to consider the order of administering justice, with the process and modes of proceeding in obtaining redress for any injury to property or to the person; an inquiry not less interesting than the former, as it contains in it the first outline of that course of judicature which prevails, with considerable alterations indeed, at this day. In pursuing this, there will be occasion to notice such parts of the law concerning private rights as have not already been mentioned.

Pleas were divided into *civil* and *criminal*. Criminal pleas were again divided into such as belonged *ad coronam domini regis*, and such as were within the jurisdiction of the sheriff (*a*). The pleas belonging to the king's crown were, the *crimen læsæ majestatis*, as the death of the king, or any sedition touching his person or the realm; pleas concerning the fraudulent concealment of treasure trove; pleas *de pace domini regis infractâ*; pleas of homicide, burning, robbery, rape, and the *crimen falsi*; all which offences were punished with death, or the loss of limbs. Only the crime of theft was excepted, which was within the cognizance of sheriff, and determinable in the county court. The sheriff, in like manner, in cases where the lord of a franchise neglected to do justice, had cognizance of *medletæ*, as they were then called, *verbera*,

(a) This is a mistake. Those within the jurisdiction of the sheriff were equally pleas of the crown, and originally all were within his jurisdiction. The *Leyes Henrici Primi* define some as in *miser cordia Regis*. The laws of Canute had specified some which were not to be confounded for those above enunciated. But theft remained a plea of the crown, and is so called by Glanville.

<sup>1</sup> Glanv. lib. 9, c. 8.

and *plagæ*; unless the party complaining added, as he might if he pleased, an allegation, *de pace domini regis infractâ*, namely, that it was against the king's peace.<sup>1</sup>

Civil pleas were divided in the same way; some being entertained in the king's court, and others in that of the sheriff. In the king's court were determined pleas concerning baronies; that is, manors held of the king *in capite*; pleas concerning advowsons, villenage, dower *unde nihil*; complaints for breach of final concords made in the king's court; questions of homage, reliefs, and purprestures; pleas of debt owing by lay persons, or, as they were called, *placita de debitis laicorum*.<sup>2</sup>

The following civil pleas belonged to the sheriff's court: pleas of right to freehold, when the court of the lord of whom the land was held, had made default in determining the right; and questions upon villenage; and these pleas were always commenced by the king's writ.

Besides these, which were all *de proprietate*, there were other pleas *super possessione*, which were decided by recognition of jurors. Of all these we shall speak in their order.

First, of pleas in the king's court, or *curia regis*, as it was then called. When any one, says Glanville, complained to the king or his justices concerning his fee or freehold, if "the matter was such as was proper for that tribunal, or such as the king pleased should be examined there, the party had a writ of summons to the sheriff, directing him to command the wrong-doer to restore the land of which he had deforced the complainant; and unless he did, to summon him by good summoners to appear before the king or his justices, at such a day, to show wherefore he refused so to do."

The following was the form of the writ: *Rex vicecomiti salutem: Præcipe A. quòd sine dilutione reddat B. unam hidam terræ in villâ* (naming it) *unde idem B. queritur, quòd prædictus A. ei deforceat: et nisi fecerit, summo eum per bonos summonitores, quòd sit ibi coram me vel justitiariis meis in crastino post octabas clausi Paschæ apud* (naming the place where the court sat) *ostensurus quare non fecerit, et habeas ibi summonitores, et hoc breve. Teste Ranulpho de Glanvilla apud Clarendon*.<sup>3</sup>

At the appointed day the party summoned either came or not, or sent a messenger to *essoîn*<sup>4</sup> him, that is, to make an *excuse* for

<sup>1</sup> In this distinction between the sheriff's jurisdiction and that of the king, we see the reason of the allegation in modern indictments and writs, *vi et armis* of "the king's crown and dignity," "the king's peace," and "the peace;" this last expression being sufficient, after "the peace of the sheriff" had ceased to be distinguished as a separate jurisdiction. Glanville, lib. 1, c. 1, 2. [This is a mistake. The criminal pleas before the sheriff were equally pleas of the crown, and Glanville so treats them. The sheriff, in criminal cases, was the king's justice.]

<sup>2</sup> Glanv. lib. 1, c. 3.

<sup>3</sup> Glanv. lib. 1, c. 6.

<sup>4</sup> *Essontum*, or *Exonium*, says Spelman: *ex privativum, et soing, cura*; ab angustia, cura, vel labore liberare; which is a more probable derivation than *εξουνοθαι*; though it should signify to excuse by means of an oath; which, to be sure, is the precise nature of an *Esson*. Vide Spelm. voce *Essoniare*.

his not coming. If he neither came, nor sent an *essoins*, the demandant was to appear in court, and wait his adversary for three days. If he did not appear at the fourth day, and the summoners offered to prove they had duly summoned him, another writ of summons issued, appointing his appearance in fifteen days at least; and this writ required him, as well to answer upon the merits of the complaint, as for his contempt in disobeying the first summons. When three writs in this form had issued, and he neither appeared nor sent any one to *essoins* him his land was taken into the king's hands, and so it remained for fifteen days; and if he did not appear within that time, the seisin of it was adjudged to the complainant, nor could the owner have any remedy to recover it, but by writ of right: yet if he appeared within those fifteen days, and was willing to *replevy* the land, he was commanded to come again on the fourth day, and right should be done, when, if he appeared the seisin was restored. Indeed, if he had appeared at the third summons, and acknowledged all the former summonses, he would lose the seisin of his land, unless he could produce a writ from the king to the justices, declaring that he had been in the king's service at the time appointed by the court, and commanding that he should not be held as a defaulter, nor suffer as such.<sup>1</sup>

• If the party denied that he was summoned, he was to swear it *duodecimâ manu*; and at the appointed day, should any of the jurors who were to swear it, fail, or any be lawfully excepted to, and no other put in his place, that very instant the defendant lost the seisin of his land, as a defaulter. If he disproved the summons in the above way, he was, the same day, to answer to the action.

Thus far of appearance and non-appearance: next as to *essoins*. If the party did not appear at the first summons, but sent a reasonable *essoins*, it would be received: and he might, in like manner, *essoins* himself three times successively. The causes of excuse, called *essoins*, allowed in the king's court, were many. The principal *essoins* was that *de infirmitate*. This was of two kinds: one was, *de infirmitate veniendi*; the other, *de infirmitate reseantisæ*; of which the first was called afterwards, *de malo veniendi*; the latter, *de malo lecti*. Essoins.

If at the first summons the *essoins de infirmitate veniendi* was cast, it was in the election of the complainant, upon his appearing in court, to demand from the *essoniator*, or person who made it, a lawful proof of the *essoins*, on the very day; or that he should find pledges,<sup>2</sup> or make a solemn engagement to bring a warrant or proof of the *essoins*, that is, the principal summoned, at a day appointed. And in this manner might the tenant be *essoined* three times successively. If he did not come at the third day, nor send an *essoins*, the court awarded that he should appear on

<sup>1</sup> Glanv. lib. 1, c. 7, 8.

<sup>2</sup> Glanville's words are: *vel plegium inveniet, vel fidem dabit*.

another day, in person, or by a sufficient attorney (or *responsalis*, as he was then called), who would be received *ad lucrandum vel perdendum* in his place. If the party summoned appeared on the fourth day, after three essoins, and avowed them all, he was required to prove the truth of them by his own oath and that of another, and on the same day was to answer to the action: and if he did not appear at the fourth day, nor send his attorney, his land was taken into the king's hands, as before mentioned. There issued also an attachment against the essoniators *tanquam falsarios*, for not performing the engagement they had made for their principal; and in the meantime the principal was summoned, to show cause why he did not avow and make good what his essoniator had engaged for in his name: a summons went also against the pledge put in, as above mentioned, by the essoniator, to show cause why he did not produce the principal to make good the essoin.<sup>1</sup>

If the principal appeared within fifteen days, and was willing to replevy the land, a day was given him; and if he then gave his sureties, he recovered his seisin. If he denied all the summonses, and disproved them *duodecimâ manu*; or if he admitted the first, avowed his three essoins, and on the fourth day produced the above-mentioned writ, testifying that he was in the king's service; he could in that case recover seisin of the land; but if he did not appear within the fifteen days, the seisin was adjudged to the complainant, as before mentioned. The direction in the writ to the sheriff for taking the land in the case of the king was *capias in manum meam*; and of that for giving possession of it to the complainant was *seisias M. de tantâ terrâ, &c.*

In the same manner a man might essoin himself three times *de infirmitate reseantisæ*, or *de malo lecti*; and if the party appeared not at the third summons, the judgment of the court was, that it be seen whether the infirmity be a *languor*, or not. For this purpose a writ issued, commanding the sheriff to send four lawful men of his county to view the party: and if they saw that it was *languor*, they were to appoint him to appear, or send his attorney, in a year and a day; but if they thought it not to be a *languor*, they were to appoint a certain day of appearance for him or his attorney, at which time the four viewers were likewise to appear and testify their view. Two essoniators were necessary to make this essoin.<sup>2</sup>

Perhaps the first two essoins might be *veniendi*, and the third *de reseantisâ*; in which case, persons were to be sent to view whether *languor* or not: but if the first two were *de reseantisâ*, and the third *veniendi*, they were adjudged as if all were *veniendi*: for it was a rule, always to judge according to the nature of the last essoin.<sup>3</sup>

We have seen that the land of a person who did not appear, was taken into the king's hands. It was also the practice, if a

<sup>1</sup> Glanv. lib. 1, c. 12-15.

<sup>2</sup> *Ibid.* c. 18, 19.

<sup>3</sup> *Ibid.* c. 20.

person had appeared and answered, and a future day was given, and at that day he neither came nor sent his attorney, that his land should be taken into the king's hands; but Glanville states this material difference, that he could not in this case replevy it; he was also summoned to hear the judgment of the court upon his default: however, whether he appeared or not, he lost his seisin for the first default, unless he could avoid the summons by the before-mentioned writ *de servitio regis*. A person who had answered in court and departed in a lawful way, might recur to the three essoins, unless there was any agreement to waive them.

If a person had essoined himself once, and at the second day he neither came nor essoined himself, we have seen that a writ issued to the sheriff to attach the essoniator *tanquam falsarium*, as before mentioned.<sup>1</sup> That the essoniator might be treated with a reasonable fairness, he also was allowed to essoin himself. Thus, if any obstacle happened to retard him in going to essoin his principal, so that he could not get to the court at the appointed day, he had till the fourth day, as his principal had; and if any one came within that time to essoin him, he was received in like manner as the essoniator of the principal.<sup>2</sup> The principal might also, if he pleased, send a second essoniator, who was to state to the court the excuse of the principal, that he sent that excuse by an essoniator who was detained by accidents on the road, and that he would prove this as the court should award.<sup>3</sup> In all cases of essoins, if the adverse party had departed, upon a day having been given by the essoniator, the appearance of the principal within the fourth day signified nothing: for the day given by the essoniator must still be observed.<sup>4</sup>

Thus far of the essoins *de infirmitate veniendi*, and *de infirmitate reseantiscæ*; or, as they have since been called, *de malo veniendi*, and *de malo lecti*. Glanville mentions several others; as that *de ultra mare*; upon which the party had at least forty days. Another was, *subita aquarum inundatio*, or the like unexpected accident, which was allowed to save the four days.<sup>5</sup> Another was called *per servitium regis*; and in that case the plea was put without a day, till the party returned from the service he was on: wherefore this was never allowed to those who were constantly in the service of the king, such persons being left to the ordinary course of the court. This essoin *de servitio regis* lay only for persons in the king's service before the plea was commenced. If any went into the king's service after the plea commenced, and essoined himself, there was this difference, whether he was there *per mandatum regis ex necessitate*, or *ex voluntate*, without any mandate. In the former case, the above-mentioned order was observed, and the plea was put *sine die*: in the latter, it was not. Another distinction was made, whether the service was *ultra mare*,

<sup>1</sup> Glanv. lib. 1, c. 20, 21.<sup>4</sup> *Ibid.* c. 24.<sup>2</sup> *Ibid.* c. 21, 22.<sup>5</sup> *Ibid.* c. 25, 26.<sup>3</sup> *Ibid.* c. 23.

or *citra mare* : if the former, he had the usual forty days, and was expected at the expiration of them to appear and show the king's writ, as we have before seen : in the latter, it was at the discretion of the justices to give a less or a greater time, as they thought it best suited the king's service.<sup>1</sup>

There was an *essoin per infirmitatem*, which infirmity must be such as had happened since the party arrived in the town where the court was. In this case the court ordered that he should appear the next day, and so on for three days successively ; and if he made the same excuse the third day, then four knights were directed by the court to attend and see whether he was able to make his appearance or not : if not, and they testified the same in court, he had a respite for, at least, fifteen days.<sup>2</sup>

Another *essoin* was *de esse in peregrinatione*. There was a distinction in this case, as in that of the king's service, whether the party had commenced his journey before the suit, or since. If he had been summoned first, the proceeding took its course, as before stated : if not, then there was a difference, whether his journey was towards Jerusalem or otherways. In the former case, he had a respite of a year and a day, at least ; in other cases, the respite lay in the discretion of the justices.<sup>3</sup>

Having considered the circumstances relating to the tenant's appearance in court, let us pause a while, and look back to the nature of the writ which was to compel this appearance, and the method taken for its execution. The writ of summons had in it this clause addressed to the sheriff, "*et habeas ibi summonitores, et hoc breve* : " in consequence of which the first inquiry, when the demandant offered himself at the appointed day in court, was whether the sheriff had there the writ and the summoners. If he had, and the summons was proved, they proceeded as before mentioned ; but if the sheriff did not appear within the fourth day (which was allowed also to the tenant), then there issued a writ *de secundâ summonitione*, directing him to summon the tenant, and to appear himself and show cause why he did not summon him upon the first writ. This contained the first writ of summons, with the addition of this clause : *et tu ipse sis ibi ostensus quare illam summonitionem ei non feceris, sicut tibi præceptum fuit per aliud breve meum, et habeas ibi hoc breve, et illud aliud breve*. If the sheriff came at the day, and confessed that he had not executed the writ, he was then, as they termed it, *in misericordiâ regis*, that is, he was amerced ; the demandant lost a day without effect, and the tenant was to be summoned again : but if the sheriff averred that he commanded lawful summoners to make the first summons, and they, being present, admitted it, they as well as the sheriff were amerced, if they had not obeyed it. But if they denied that the sheriff gave them charge of the summons, then there was a distinction, whether the sheriff gave it in the

<sup>1</sup> Glanv. lib. 1, c. 27.

<sup>2</sup> *Ibid.* c. 28.

<sup>3</sup> *Ibid.* c. 29.

county-court or not. Such matters ought, properly, to be transacted in that court; and if the plea was commenced some time before the county-court, Glanville says, *attachiabitur usque ad comitatum*, and then a complete summons was to be made. If, then, the summoners had been enjoined in the county, and it was so proved, the summoners were amerced; for this was a solemn act, which they would not be allowed to deny: if out of the county, and they denied the command, then the sheriff alone was amerced, for executing the writ in a private and improper manner: for all public acts, such as enjoining summons to be made, taking pledges of prosecuting, and pledges *de stando ad rectum*, ought to be transacted in a public manner, that there might be no debate concerning such prefatory process; a circumstance which would lead to great impediments in suits. If the summoners were not present at the appointed day, but sent their essoniators, who essoined them; and added, that they had properly summoned the party; in that case, the first day was considered as not lost to the demandant, and the summoners were amerced for not appearing and proving the summons, as was enjoined them, unless they could excuse themselves by the king's writ *de servitio*. It should be remembered, that one or other of the summoners might excuse himself at the first day; and in that case the first day was not considered as lost to the demandant.<sup>1</sup>

Such was the proceeding where the tenant was simply summoned, without any pledges being given. It may be proper to <sup>of attach-</sup> mention in this place, what the process would be, when <sup>ment.</sup> an *attachment* was necessary. If the suit was of a kind to make it necessary for the tenant to find pledges *de stando ad rectum* for his appearance (as was the case in pleas for breach of a final concord made before the king or his justices, and for novel disseisin), and these pledges had been recorded in the county court, or before the justices; then if the tenant did not appear, nor essoin himself, the pledges were adjudged to be amerced, and further pledges were required, to engage for his answering to the suit. This was to be done three times; and if he did not come at the third summons, his land was taken into the king's hands, in like manner as before mentioned; and the pledges likewise were amerced, and summoned to appear in court at a certain day, in order to hear the judgment. This was the course of *attachment* in civil causes: but in criminal ones, as in those *de pace domini regis infractâ*, if the party did not appear at the third summons, there issued a *capias* to take the body, the pledges being amerced as in the former cases.<sup>2</sup>

Thus far of the default of the tenant. If the demandant did not appear at the first day, he might essoin himself in like manner as the tenant. If he neglected both, the tenant was dismissed *sine die*; so, however, as that the demandant might institute another suit for the same cause of action. But as to this, and the conse-

<sup>1</sup> Glanv. lib. 1, c. 30, 31.

<sup>2</sup> *Ibid.* c. 31.



quence of the tenant's default, there was a diversity of opinions in Glanville's time. Some held, that he only lost his first writ, with his costs and expenses, but not his action; so that he was at liberty to commence another: others thought he lost his action totally, without any right of recovery; and that he should be amerced for his contempt of court. Others were of opinion, that he lay at the king's mercy, whether he should be admitted to bring his action again. In either case, if the demandant had found pledges *de clamore suo prosequendo*, as was the case in some suits, his pledges were likewise to be amerced. Glanville further adds, that in criminal matters and those relating to the peace, where the king had an interest, as he was bound to prosecute, his body was to be taken and kept in custody until he prosecuted his appeal: besides which, his pledges were still to be amerced.<sup>1</sup> If both demandant and tenant were absent at the day, it was in the discretion of the king or his justices to proceed against both; against the tenant for contempt of court, and the demandant for false claim.<sup>2</sup>

When obedience had been paid to the writs of summons, and both parties were in court, the demandant made his demand of the land in question; and then the tenant might, if he pleased, pray a view of the land. If the tenant had no other land in the same vill, the view was made without delay; but if he had, the tenant was respited, and another day given in court. When he departed in this manner from court, he might claim three essoins; and a writ was directed to the sheriff to send *liberos et legales homines* (not specifying any number) of the vicinage of the vill to view the land in question, and to have four of them to certify their view to the court.<sup>3</sup>

After the three essoins accompanying the view, and after both parties had appeared in court; then the demandant was to set forth his claim in the following manner: *Peto, &c.*, "I demand against *B.* one hide of land in such a vill (naming it) as my right and inheritance, of which my father (or grandfather, as it might be) was seised in his demesne as of fee, in the time of Henry I. (or after the first coronation of the king, as it might be), and from which he received produce to the value of fifty shillings at least (as in corn, hay, and other produce); and this I am ready to prove by this my free man John: and if anything should happen to him; by him, or him" (for he could name several, though only one could wage battle) "who saw and heard this." Or he might conclude in this form: "and this I am ready to prove by this my free man John, whom his father, on his death-bed, enjoined, by the faith a son owes a father, that if he ever heard of any plea being moved concerning this land, he would *de-raise* (or prove) this,"<sup>4</sup> as what his father had seen and heard."<sup>5</sup>

<sup>1</sup> Glanv. lib. 1, c. 32.

<sup>2</sup> *Ibid.* c. 33.

<sup>3</sup> *Ibid.* lib. 2, c. 1, 2.

<sup>4</sup> Glanville's words are: *Hoc dirationaret, sicut id quod pater suus vidit, et audivit.*

<sup>5</sup> Glanv. lib. 2, c. 3.

This was the manner in which the demandant spread out the substance of his writ ; and his reliance was always upon the testimony *de visu et auditu*.

After the demandant had thus made his claim, it was in the election of the tenant, whether he would defend by *duel*, The duel. or avail himself of the privilege granted by the king's late statute, and demand that a *recognition* should be made, which of the two had the greatest right to the land. If he chose the duel, he was to defend his right *de verbo in verbum*, as the demandant had set it forth ; either in person, or by some fit champion. It was a rule, that when the duel was once waged, the tenant could not claim the benefit of the new law.

After the duel was waged, the tenant might essoin himself three times, as for himself ; and in addition to these, three times in respect of his champion. When all these essoins were elapsed, the demandant was to bring his champion into court, ready for the engagement : the champion was to be the same person upon whom he put the proof in his claim : nor could he put any one in his place after the duel was once waged. If he who waged the duel happened to die, and that was declared by the voice of the vicinage, he might recur to one of the others named in the claim ; or even a stranger, if that stranger was qualified to be a proper witness ; for that qualification was always required in the champion of the demandant. But this was only where the champion died by a natural death ; for if it happened by any fault or neglect of his own, no other could be substituted in his place, and the demandant lost his suit. Glanville states it as a question, whether the demandant's champion himself could nominate any one in his place ; and he thought, that by the old and established custom of the realm, he could not appoint any one, except his son born in lawful wedlock.

As we before said, the champion of the demandant must be a person who could be a proper witness of the matter in question *per visum et auditum* ; the demandant of consequence could not be his own champion ; but the tenant might defend himself either *in person*, or by another fit champion. If the champion of the tenant died, it was a question what was to be done ; whether the tenant might defend himself by some other, or was to lose his suit, or only seisin of the land : Glanville thought it was to be ordered exactly as in case of the demandant's champion dying.

It sometimes happened, that the champion was a person hired for a reward. This was a good cause of exception ; and if the adverse party offered to prove it by one who saw the reward given, he was to be heard to this point ; and the duel in the meantime was deferred. If the champion of the demandant was convicted of this charge, or was vanquished in the duel upon the point of right, the demandant lost his suit, and the champion lost his *legem terræ* ; that is, he was never after to be received as a witness to wage duel

for any one; though he might in a cause of his own, either as defendant or appellant, in matters of the peace and of personal injury; he might also defend by duel his own right to a fee and inheritance. In addition to the loss of his law, he was to be fined in the penalty of sixty shillings, *nomine recreantisæ*, on account of his cowardice. If the champion of the tenant was conquered, his principal lost the land in question, with all the fruits and produce found on it at the time of the seisin, and was never to be heard in a court of justice concerning the same; for it was a rule, that whatever was once determined in court by duel, remained ever after fixed and unalterable. There, accordingly, issued a writ to the sheriff, *quòd sine dilatione seisiās M. de unâ hidâ terræ, &c.*—*quia ea hidâ terræ adjudicata est ei in curiâ meâ per finem duelli.* When the champion of the demandant was conquered, as before mentioned, the tenant was quit-claimed<sup>1</sup> from any right of the demandant to recover against him.

This was the course of proceeding, when the tenant, in a writ of right, chose to defend his right by duel.<sup>2</sup> But the tenant might avail himself of the provision lately made by Henry II., and put himself upon the assize; to which the demandant might consent, and put himself also upon the assize.

If the demandant had expressed before the justices in open court<sup>3</sup> his consent to put himself on the assize, he was not allowed to retract, but must stand or fall by the assize, unless he could show some good cause why the assize should not pass between them. One cause which might be shown, was, that they were of the same blood, and descended from the same stock whence the inheritance came. If this was admitted by the other party, the assize was waived, and the question was argued and determined by the court; it being a point of law, which was the nearest to the first stock, and the heir with the better title. In this manner the nearest heir obtained the land, unless it could be shown that he or his ancestor had any way lost it, sold it, made a gift of it, changed it, or by any other means had parted with it; and if the cause was rested upon any of these points of fact, it might be determined, says Glanville, by the duel.

Suppose the person who had put himself on the assize, had denied this impediment of relationship; such a question was tried by calling into court the common relations of both parties. If these agreed unanimously that they were related, it was usual to abide by this declaration; but if one of the litigants still continued to deny it to be so, the last resort was to the vicinage; and if they agreed with the relations, this complete testimony was acquiesced in. Should the relations differ in their testimony, the vicinage was

<sup>1</sup> *Quietus clamabatur de ejus clameo.*

<sup>2</sup> Glanv. lib. 2, c. 4, 5.

<sup>3</sup> So I construe *coram justitiis in banco sedentibus*, though this phrase has been quoted by some persons to show that, in the time of Glanville, there were justices *de banco*, in the modern sense of those words; a construction which this passage will certainly not warrant.

in like manner called in, and their verdict was decisive. If, upon this inquisition being made, it appeared to the court and justices that the parties were not descended from the same stock, the person who made the exception was to lose his suit. If there was no exception taken, then the assize proceeded, and its determination was as final as that by duel.<sup>1</sup>

Before we enter on the proceeding of the assize, let us reflect with Glanville upon the nature and design of this innovation upon the old method of trial. "The assize," says that author,<sup>2</sup> "is a royal benefit conferred on the nation by the prince in his clemency, by the advice of his nobles, as an expedient (*a*) whereby the lives and interests of his subjects might be preserved, and their property and

(*a*) Nevertheless (whatever may be the true reading, as to which the *Mirror*, Bracton, and Fleta, all contemporary authorities, support the reading contested by the author), it can be clearly shown from history that the constitution was not established either by Henry II. or Glanville; nor does Glanville say so, nor say (as the author evidently supposes him to mean) that there was any formal ordinance or constitution establishing it, in this reign or in any other. What he says is merely that it was "a constitution which the subject owes to the administration of justice, under the royal authority, with the advice of his council," that is, the chancellors and chief justiciaries for the time being. There is nothing to denote or indicate that Henry II. was particularly referred to, and Glanville himself was chief justiciary, and would well know if there was any new ordinance or constitution establishing the trial, and would state it if there had been; but he does not state anything of the kind. And he speaks of the assize, all through his work, as a trial by twelve jurors, who are called "recognitors," because they found their verdict upon their own knowledge; and the trial is called an assize merely because it decided the right to real property, whereas trial by jury was a general term applicable to all matters. The assize, then, was simply trial by jury, regulated and adapted to the trial of real actions in the *king's court*. At the Conquest the jurisdiction in real actions was in the county courts, and then, as we have seen, the great case of the Archbishop of Canterbury, a writ of right, was tried in the county court of Kent, and tried *by a jury*. And in the laws of Henry I., the county court is described as the "*curia regis*," and no allusion is made to any other, unless it be the exchequer, as a fiscal tribunal. And in the earlier and older part of the *Mirror*, in like manner, the only kind of court described directs the *sheriff* to try the case. It had, however, by slow degrees, been contrived to bring the jurisdiction into the king's court, which, be it observed, at this time followed the king's household, wherever he was. And a new procedure was required to provide for trial by jury in the king's court of assizes of land in another country. That this was all, is clear from the fact that in the reign of the Conqueror cases of writs of right were tried by juries in the county court. Lord Coke gives the record in the Kent case, and it appears that it was a writ of right. That, therefore, in reality was just the same proceeding as under the assize, and except that the assize was in the king's court, and *not* in the county, for which reason Magna Charta provided that the assizes *should* be taken in the counties.

<sup>1</sup> Glanv. lib. 2, c. 6.

<sup>2</sup> The words of Glanville are: *Est autem assisa regale quoddam beneficium clementiæ principis, de concilio procerum populis indultum*. I quote this from the last edition of Glanville, adhering to the reading which is warranted by the consent of the Harleian, Cottonian, and Bodleian manuscripts, in opposition to the old printed text, which reads *magna assisa*, &c., an epithet which, I am clear, has been interpolated in this and other passages of Glanville by a later hand, at a period when the distinction between the *great assize* and other assizes had grown familiar among lawyers. This corruption of the text in so remarkable a passage as the present, has had the effect of establishing a vulgar opinion, that the alteration made by Henry II. related only to the trial in the writ of right; an opinion which is not warranted by the history of this revolution, and which is left without any support, as it should seem, when the concurring testimony of these three MSS. is against the insertion of this epithet in most of the places where it is used.

rights enjoyed, without being any longer obliged to submit to the doubtful chance of the duel. After this" (continues he) "the calamity of a violent death, which sometimes happened to champions, might be avoided, as well as that perpetual infamy and disgrace attendant upon the vanquished, when he had once pronounced the *infestum et inverecundum verbum*." The horrible word here alluded to was *craven*; by which the champion signified that he yielded, and submitted himself to all the consequences attending such a defeat. "This legal institution," says Glanville, "is founded in the greatest equity, and the fullest desire of doing justice. For a question of right, which, after many and long delays, can hardly ever be made out by duel, is investigated with despatch and ease by the benefit of this constitution. The assize itself is not clogged with so many essoins as the duel. By this the expenses of the poor are spared, and the labour of all is shortened. In fine, as the credit of many fit witnesses has a greater influence in judicial inquiries than that of one only; so this constitution contains in it more justice than the duel. The duel proceeds upon the testimony of one witness only (a); this constitution requires the oaths of at least twelve lawful men."<sup>1</sup> Such is the manner in which Glanville speaks of the institution of the assize.

The proceeding by assize was thus: The party who had put himself upon the assize, sued out a writ *de pace habendâ*. This was to prohibit the lord (if the suit was in the lord's court) from entertaining any suit, in which the duel had not been already waged, between the same parties for the same land, because one of the parties had put himself upon the king's assize and had prayed a recognition to be made, who had the most right.<sup>2</sup> Upon this, the demandant came to the court, and prayed another writ, whereby four lawful knights of the county might be directed to choose twelve lawful knights of the vicinage, who should say upon their oaths, which party had most right to the land in question. As this is the first process for the return of jurors of which we have any mention, it may be proper to insert it at length. It ran in these words: *Rex vicecomiti salutem. Summone per bonos summonitores quatuor legales milites de vicineto de Stoke, quòd sint ad clausum Paschæ coram me vel justitiis meis apud Westmonasterium ad eligendum*

(a) Here the author has misunderstood Glanville, who says that the trial by duel proceeds upon the oath of *one juror only*, each of the parties being sworn to the truth of his case, and hence the very title of the mode of trial in the *Mirror* is "*Juramentum Duelli*" (c. iii. s. 24). And, as our author elsewhere says, though he constantly forgets, the jurors were witnesses. Hence, when Glanville goes on to say that in the assize there must be the *oaths* of twelve men, he means that they are jurors, for what were jurors but men sworn? And hence in other passages, wherever he speaks of the assize, he speaks of it as tried by twelve jurors (*vide* lib. xiii., c. vii., lib. c. 11). Therefore the assize was simply trial by jury instead of trial by battle. The trial was called the recognition, for the very reason that as jurors found their verdict at that time upon their own knowledge, they were said to recognise; and so were recognitors; but they were for that very reason jurors.

<sup>1</sup> Glanv. lib. 2, c. 7.

<sup>2</sup> *Ibid.* c. 8, 9.

*super sacramentum suum duodecim legales milites de eodem vicineto, qui melius veritatem sciant, ad recognoscendum super sacramentum suum utrum M. aut R. majus jus habeat in una huius terre in Stoke quam M. clamat versus R. per breve meum, et unde R. qui tenens est, posuit se in assisam meam, et petit recognitionem fieri, quis eorum majus jus habeat in terra illa, et nomina eorum inbreviari facias. Et summane per bonos summonitores R. qui terram illam tenet, quod tunc sit ibi auditurus illam electionem, et habeas ibi summonitores, &c.*

At the day appointed the tenant might essoin himself three times; for it was a rule, that as often as either party appeared in court, and did what he was commanded by the law to do, he might again recur to his three essoins. But if this was allowed, the consequence would be, that as many or more essoins would intervene in the proceeding by the assize than by duel, which would ill agree with what we have just said about the conciseness of this new method. For suppose the tenant essoined himself three times, on the election of the twelve knights by the four; afterwards when he appeared in court, some or other of the four knights might essoin himself; and then, after these essoins, the tenant might again essoin himself afresh; so that the assize would hardly ever be brought to any effect: it was therefore necessary to defeat the operation of the above rule, in this instance. A constitution was accordingly passed, enabling the court to make order for removing these obstacles, and expediting the proceeding; in pursuance of which, when the four knights appeared at the appointed day in court, ready to choose the twelve knights, they were authorised, whether the tenant appeared or not, to proceed to the election. If he had been present, he might make a lawful exception to any of the twelve; and therefore the court would, in his absence, direct more than twelve to be elected, that when he appeared, he might have a greater chance to find twelve unexceptionable jurors. Jurors, says Glanville, might be excepted against in the same manner as witnesses were rejected in the court christian; jurors being in fact only witnesses, and the testimony of witnesses being always considered as a matter of canonical regulation.

So desirous were they of avoiding delay, that upon the tenant appearing, if all the four knights did not appear, yet by the advice of the court, and assent of parties, one of the knights, taking two or three others of the county then in court, though not summoned, might proceed to elect the twelve: though, to avoid all cavil, and in order to have enough to make the election, they usually had the caution to call six or more knights to court. In all such points, the discretion of the court was suffered to govern the established course of proceeding; which, says Glanville, the king or his justices might temper and accommodate to the equity of the case then before them.<sup>1</sup>

<sup>1</sup> Glanv. lib. 2, c. 12.

When the twelve knights were elected, they were summoned by the following writ: *Rex vicecomiti salutem. Summone per bonos summonitores illos duodecim milites, scilicet, A. B. &c., quòd sint die, &c., coram me vel justitiis meis ad, &c., parati sacramento recognoscere utrùm R. vel N. majus jus habeat in unâ hidâ terræ, quam prædictus R. qui clamat versus prædictum N. et unde prædictus N. qui rem illam tenet, posuit se in assisam nostram, et petiit inde recognitionem, quis eorum majus jus habeat in re petitâ ; et interim terram illam, unde exigitur servitium, videant : et summone per bonos summonitores N. qui rem ipsam tenet, quòd tunc sit ibi auditurus illam recognitionem.* At the day appointed for the knights to make their recognition, no essoin could be cast by the tenant, nor was his presence necessary: as he had once put himself upon the assize, he had now nothing to say why the recognition should not proceed. It was different with regard to the demandant; for if he essoined himself, which he might do, the assize remained for that day, and another day was given: for it was a rule, that though any one might lose by his default of appearance, yet no one should gain anything if not present in court. *Perdere potest quis propter defaultum, lucrari verò nemo potest omninò absens.*<sup>1</sup>

The assize being about to make their recognition, it is next to be considered how they were enabled to do it. Now, some, or all, might know the truth of the matter, or all might be ignorant of it. If none of them knew anything of the matter, and they testified the same in court, upon their oaths; the court resorted to others, till they found those who did know the truth. If some were acquainted with the fact, and some not, the latter were rejected, and others called in, till twelve at least were found who could agree. Again, if some were for one of the parties, and some for the other, fresh jurors were to be added till twelve were found who agreed in opinion for one of the parties. It is to be observed, that all who were called in, were to swear that they would not speak what was false, nor knowingly be silent as to what was true; and the knowledge they were expected to have of the matter must have been from what they themselves had seen or heard, or from declarations of their fathers, and such evidence as claimed equal credit with that of their own ears or eyes. *Per proprium visum suum, et auditum, vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis.*<sup>2</sup>

When the twelve knights were agreed in the truth, they then proceeded formally to recognise, whether the demandant had most right in the thing in question. If they said the tenant had most right, or said that which satisfied the king or his justices that he had most right, then the judgment of the court was, that he should go quit of the demandant for ever, so as the demandant should never be heard again in court with effect; for a suit once lawfully

<sup>1</sup> Glanv. lib. 2, c. 15, 16.<sup>2</sup> Ibid. c. 17.

determined by the king's great assize, could never be stirred again on any occasion whatever. If the assize were of opinion for the demandant, and the court gave judgment accordingly, then the adversary lost the land in question, with all its fruits and profits found there at the time of the seisin.<sup>1</sup>

Upon this there issued a writ of execution, *quod seisiās N. de unā hidā, &c., quia idem N. dirationavit terram illum in curiā meā per recognitionem, &c.*,<sup>2</sup> reciting the mode of trial, as the before-mentioned writ of seisin did the duel. We may here notice, that the duel and assize had become so co-extensive in their consequences, as for it to grow into a rule, that the duel should not be where the assize was not allowed, nor the assize where there was no duel.<sup>3</sup> Assizes lay concerning services, land, demands of service, rights of advowson, and that not only against a stranger, but even against a lord.<sup>4</sup>

The regal constitution by which the assize was appointed (*a*), had also ordained a punishment for jurors *temerè jurantum*, or who swore falsely. If any were proved, or confessed themselves, guilty of perjury, they were to be spoiled of all their chattels and movables, which were forfeited to the crown; but they were permitted by the clemency of the king to retain their freeholds; they were to be thrown into prison, and be there detained for a year at least; they were to lose the *legem terræ*, or, in other words, incur the brand of perpetual infamy.<sup>5</sup>

It was a question in Glanville's time, what was to be done, if no knights could be found, of the vicinage or of the county, who knew the truth of the matter; whether the tenant was therefore to prevail, as the person in possession; or the demandant to lose his right, if he had any. Suppose, says he, two or three lawful men, or any other number less than twelve, who were witnesses of the fact, offered themselves in court *ad dirationandum*, and said and did everything in court proper for the occasion, could they or could they not be heard? <sup>6</sup>

This was the order of proceeding, when the presence of the tenant only was necessary, and no one else was brought in to answer. There were many cases where it was Vouching to  
warranty.

(a) There was no such constitution; it is a complete mistake of the author's. What Glanville alludes to is the common law punishment of false jurors, which is mentioned in the *Mirror*. All this he calls the twelve triers jurors, or recognitors, because *being* jurors, they recognised the truth of their own knowledge. What Glanville says is, that a punishment is ordained for those who falsely swear in such a proceeding (*i.e.* a trial by jury), and is, therefore, introduced into this institution. And then he simply states the common law as to attain. Hence Lord Coke refers to this chapter, to prove that an attain lay at common law (2 Just. 236). And the *Mirror* states it as applicable to trial by jury (c. 5). Glanville, being chief justiciary, simply made some regulations for the conduct of the proceeding, and then for the sake of flattery calls it a royal institution. In the *Mirror* are several instances of ordinances, by chief justiciaries, relating to the administration of justice, and more than one of them by Glanville himself, *vide ante*.

<sup>1</sup> Glanv. lib. 2, c. 18.

<sup>4</sup> *Ibid.* c. 13.

<sup>2</sup> *Ibid.* c. 20.

<sup>5</sup> *Ibid.* c. 19.

<sup>3</sup> *Ibid.* c. 19.

<sup>6</sup> *Ibid.* c. 21.



requisite to call in a third person; as when the tenant declared in court that the thing in question was not his own, but that he held it *ex commodato*, or *ex locato*, or *in vadium*, that is, in gage or pledge, or committed to his custody, or in some other way entrusted to him by the real owner; or if he should declare the thing was his own, but that he had some one *to warrant* it, as the person who made a gift of it, or sold it, or gave it in exchange: or should he declare in court, that the thing was not his, but belonging to another person, that person was to be summoned by some other similar writ; and so the suit was to be carried on afresh against *him*. When he appeared in court, he, in like manner, might admit the thing to be his, or not. If he said it was not his, the tenant who had said it was, *ipso facto* lost the land without recovery, and was summoned in order to hear the judgment of the court to that effect: and whether he came or not, the adversary recovered seisin.

When the tenant called a person for any of the above reasons *to warrant* the land, a day was given him to have in court his warrantor; and upon this he was entitled to three essoins respecting himself, and three others respecting the person of his warrantor. At length the warrantor appearing in court, he either warranted the land or not. If he would enter into the warranty, the suit was from thence carried on with him, and everything went under his name, in lieu of the tenant; not but that the tenant, if he had essoined himself, would be considered as a defaulter, if absent. If the warrantor, being present in court, declined entering into the warrant, the suit was to be carried on between the tenant and him; and after allegations on both sides, they might come to the duel, although, perhaps, the tenant might not be able to show a charter of warranty, but could only produce a fit witness to deraign it. The object of all this was, to prove the warrantor to be bound to the warranty, which would make the tenant entirely safe; for should the land be recovered from him, the warrantor, if able, was bound by law to give him an *excambium*, as they called it, or an equivalent in recompense.

As this was the effect of a warranty when proved, it often happened that a person called to warranty was shy of coming to court: at the prayer of the tenant, therefore, the court would think it advisable to compel him, by a writ of summons *ad warrantizandum*.<sup>1</sup>

At the day appointed, this person, like all others who were summoned to appear in court, might essoin himself three times. At the third essoin the court would award, that at the fourth appointed day he, or some attorney for him, should appear; but if he did not, there seems to have been a doubt what should be done to punish the contempt: for if the land in question was taken into the king's hands, this would seem unjust to the tenant, who had

<sup>1</sup> Glanv. lib. 3, c. 1-3.

not been adjudged in default; and yet if it was not done, there seemed to be a want of justice to the demandant, whose suit was delayed. Indeed Glanville thought that, notwithstanding these reasons, the law and custom of the realm required the land to be taken; for no hardship would fall on the tenant, it being a rule, that wheresoever a person lost his land through the default of his warrantor, the warrantor should make him a recompense in value.<sup>1</sup>

It sometimes happened that a tenant neglected to call in the person on whom he had a claim of warranty, and defended the right himself. In this case, if he lost it, he could have no recovery against his warrantor. It was by some made a question, whether, upon the same principle as the tenant might defend his right by duel without the assent and presence of his warrantor, he might put himself upon the king's great assize without his assent and presence; but Glanville thought that the same reason should prevail in both cases.<sup>2</sup>

A suit was sometimes impeded by the absence of lords; as when the demandant claimed the land as belonging to the fee of one, and the tenant as belonging to the fee of another lord. In this case, each lord used to be summoned to appear in court, that the plea might be heard and determined in their presence, lest any injury might otherwise be done to their rights. The lords, when summoned, might essoin themselves three times, as was usual in other cases. If the lord of the tenant had had his three essoins, and the court had directed him to appear, or send his attorney, and he made default, the judgment then was, for the tenant to answer and take upon him the defence: and if he prevailed, he retained the land, and for the future did his suit and service to the king, the lord having lost it by his default, till he appeared and did as the law required. In the same manner the lord of the demandant might essoin himself three times; and if, after that, he absented himself, it was Glanville's opinion, that his essoniators and the person of the demandant should be attached for contempt of court, and in that manner be compelled to appear.<sup>3</sup>

When the two lords had appeared, and the lord of the tenant said that the land was in his fee, he might take upon him the defence of the suit, or intrust it to the tenant; and in either case, should they prevail, their several rights were secured: but if they lost the suit, the lord lost his service, as well as the tenant his land, without any recovery. If the tenant's lord, being present in court, failed of the warranty, and the tenant maintained that he was bound to the warranty, because he or his ancestors had done such and such service to him or his ancestors, as lords of that fee, and he could produce those who had heard and seen this, or a proper witness to deraign it, or other fit and sufficient proof, as the court should award: if the tenant could say this, then he and the lord

<sup>1</sup> Glanv. lib. 3, c. 4.<sup>2</sup> *Ibid.* c. 5.<sup>3</sup> *Ibid.* c. 6.

might interplead with each other.<sup>1</sup> If the demandant's lord entered into the warranty, and they failed in the suit, the lord in like manner lost his service. But the fate of the demandant was different from that of the tenant, if his lord would not enter into the warranty; for he was amerced for his false claim.<sup>2</sup>

Thus has the reader been conducted through the proceeding in a writ of right, with all its incidents and appendages, when prosecuted for the recovery of land. This relation has been somewhat long and minute; but as it contains in it, with some small alteration, the scheme of process and proceeding in most other actions, it was indispensably necessary to trace it with some exactness. After this, the remainder of our inquiry into the course of judicial remedies will be more easy, and the matter will be more various and entertaining. We shall now proceed to speak of other methods of recovering property: and first of advowsons.

An action for the advowson of a church might be brought either Writ of right of advowson. while the church was full, or when it was vacant. If the church was vacant, and any one obstructed the person who thought himself the patron, in presenting a clerk, and claimed the presentation to himself, there was a difference to be made, whether the contest was for the advowson; that is, upon the *right* of presenting, or upon the *last presentation*—that is, the *seisin* of the right of presenting. If it was upon the last presentation, and the person claiming it said that he or some ancestor of his made the last donation or presentation, then, says Glanville, the plea is to be conducted according to the late ordinance<sup>3</sup> about the advowsons of churches, and an assize was summoned to make recognition *what patron, in time of peace, presented the last deceased person to the church*, of which assize more will be said when we come to speak of other recognitions. For the present it will be enough to remark, that he who recovered by such an assize recovered seisin of the presentation so as to present a proper person, with a saving of the demandant's claim as to the right of the advowson.

If the right of advowson only was demanded, the demandant must add something as to the last presentation, either that "he or one of his ancestors had it," or that the tenant or one of his ancestors had it, or that some stranger had it, or that he was ignorant who had it. Whichsoever of these allegations it might be, if the other party claimed the last presentation as his own or his ancestor's, the recognition was, notwithstanding, to proceed upon the right of presenting, except only in one of the above-mentioned

<sup>1</sup> Glanv. lib. 3, c. 7.

<sup>2</sup> *Ibid.* c. 8.

<sup>3</sup> Perhaps Glanville here alludes to the famous statute about assizes; or, from the expression, it seems more probable, a statute had been ordained since that, which directed recognitions to be made in case of last presentations. It is not unlikely that the many assizes which grew into use in the time of Henry II. were introduced at different times, according as this mode of proceeding was recommended by experience of its benefits.

cases; that was, where the demandant admitted that the tenant, or one of his ancestors, had the last presentation; for then, without going to the recognition, he was to present at least one person. When, however, the last presentation had been decided<sup>1</sup> by the assize, as before mentioned, or in any other lawful way, and a person was presented accordingly by the successful party, then the party who was resolved to try the right of advowson might go on with the suit, and have the following writ: 2—*Rex vicecomiti salutem. Præcipe N. quoddam justitiam et sine dilatione dimittat R. advocacionem ecclesie in villâ, &c., quam clamat ad se pertinere, et unde queritur quoddam ipse injustitiam ei deinceps: et nisi fecerit, summonere per bonos summonitores cum quoddam sit die, &c., ibi coram nobis vel justitiis nostris, ostensurus quare non fecerit, &c.*<sup>3</sup>

The person summoned had the same essoins as were before mentioned in the plea of land; and if, after these, he did not appear at the fourth appointed day in person, or by attorney, Glanville thought the next process was for taking into the king's hands seisin of the presentation. The sheriff was to execute his writ of *capias in manu* in the following way: he was to go to the church, and there declare publicly, in the presence of some honest men, that he seised the presentation into the king's hands: the seisin remained in the king's hands fifteen days, with a liberty to the tenant to replevy it within the fifteen days, as was before stated.<sup>4</sup> In short, after all the essoins were run out, if one or both the parties absented themselves, the course was ordered as in a plea of land.

When both parties appeared in court, the demandant propounded his right in these words:—*Peto, &c.* "I demand the advowson of this church as my right, and appertaining to my inheritance, of which I (or one of my ancestors) was seised (in the time of Henry I. or) since the coronation of the king; and being so seised, I presented a person to that church (at one of the before-mentioned times); and so presented him, that he was instituted parson according to my presentation: and if any one will deny this, I have here some honest men<sup>5</sup> who saw and heard it, and are ready to prove it,<sup>6</sup> as the court shall award; and particularly this *A.* and this *B.*"<sup>7</sup>

When the claim of the demandant was thus set forth, the tenant might defend himself by the duel, or put himself upon the assize; and in both cases it would be ordered as before mentioned.<sup>8</sup>

This was the manner of contesting a right of advowson when the church was vacant. It might also be contested when the church was full; as if the *parson*, or he who called himself parson, in the church, claimed his title by one patron, and another claimed the advowson, the latter might then have the following writ against the parson: *Rex vicecomiti salutem. Summone per bonos summoni-*

<sup>1</sup> *Dirationata.*<sup>4</sup> *Ibid.* c. 3, 4, 5.<sup>7</sup> Glanv. lib. 4, c. 6.<sup>2</sup> Glanv. lib. 4, c. 1.<sup>5</sup> *Probos homines.*<sup>3</sup> *Ibid.* c. 7.<sup>8</sup> *Ibid.* c. 2, *Vide ante*, 114.<sup>6</sup> *Dirationare.*

*tores clericum illum M. personam ecclesiæ, &c., quòd sit coram me vel justis meis apud Westmonasterium ad diem, &c., ostensurus quo advocato se tenet in ecclesiâ illâ, cujus advocationem miles ille M. ad se clamat pertinere. Summone etiam per bonos summonitores ipsum N. qui advocationem illi deforceat, quòd tunc sit ibi, ostensurus quare advocationem ipsam ei deforceat, &c.*<sup>1</sup>

If the clerk did not appear according to the summons, nor send any to essoin him, or if, after the three essoins, he did not come, or send his attorney, Glanville thought, that having no lay fee by which he might be distrained, the bishop (or his official, in case the see was vacant) should be commanded to distrain him, or punish his default by taking the church into his hands, or using some other lawful means of compulsion.<sup>2</sup>

When the clerk appeared in court, he would, perhaps, admit the demandant to be the patron, and would say, that he was instituted upon his presentation, or that of some of his ancestors: if so, the plea went on no further in the king's court; for if the demandant denied the presentation, he was to maintain his controversy with the clerk before the ecclesiastical judge. Perhaps the clerk said the advowson belonged to the party summoned: now such party was dealt with in this manner: If he came at none of the three summonses, nor sent any essoin; or having essoined himself, neither came nor sent his attorney at the fourth day; the advowson of the church in question was seised into the king's hand, and so it remained for fifteen days; and if he did not appear in those fifteen days, then seisin thereof was given to the demandant. In the meantime, it was a question, what was to be done with the clerk, whether he was *ipso facto* to lose his church or not. But supposing the party summoned appeared, and disclaimed all right in the church, the suit in the king's court ceased, and the patron and clerk contested their claims in the court christian. Should the church happen to become vacant *pendente lite*, Glanville thought, if there was no question but that, the person against whom the right of advowson was demanded had the last presentation, either in himself or his ancestors, that he should be allowed to present a clerk, at least till he had lost the seisin: consistently with which he thought, that should a vacancy happen while the advowson was in the king's hands for fifteen days, the patron did not lose that presentation. If the party summoned should say the right of advowson was his, it was tried, as we before said of land. If he prevailed, he and his clerk were freed from the claim of the demandant; if he failed, he and his heirs lost the advowson for ever.<sup>3</sup>

When the right of advowson was in this manner determined, it became a question what was to be done with the clerk, who admitted in court that he had the incumbency of the church by presentation of the unsuccessful party. As the king's court could proceed no

<sup>1</sup> Glanv. lib. 4, c. 8.

<sup>2</sup> *Ibid.* c. 9.

<sup>3</sup> *Ibid.*

further than the right of advowson between the two patrons, the party who had now recovered the advowson was to proceed against the clerk before the bishop, or his official: yet after all, if at the time of the presentation the person presenting was believed to have been the patron, he was left in possession of the church during his life; for in the reign of this king, at the council at Clarendon, a statute had been made concerning clerks who had enjoyed churches by the presentation of patrons *pro tempore*, which ordained that clerks who had violently intruded themselves into churches during time of war, should not lose such livings during their lives.<sup>1</sup> This provision saved the titles of many beneficed clerks at that time. Nevertheless, in such case, after the incumbent's death, the presentation returned to the lawful patron.<sup>2</sup>

The following points might arise upon what has been said concerning the right of advowson and the last presentation. When a patron had recovered an advowson by deraignment in court, and afterwards, in process of time, the parson died; it might be asked, whether the patron against whom the advowson had been recovered, could maintain an assize *de ultimâ presentatione*; and what answer could, in that case, be given to it by the adverse party. For suppose the person bringing the assize had not, but some of his ancestors had had the last presentation; and it was objected to him, that he ought not to have a recognition, because he had lost the advowson to the tenant in the assize, by a solemn judgment of the court, whether this would be a bar to the assize. It should seem, says Glanville, that it would; because, as he had not the last presentation, he never had seisin of the advowson: but, it should seem, says he, that he might well go upon the seisin of his father, notwithstanding what had been determined respecting the right of advowson. And yet if a question could be thus started upon the last presentation, it looks like invalidating the judgment of the king's court, before given, upon the right of advowson; for when that had been solemnly adjudged, it should hardly seem that he ought by law to recover any seisin, particularly as against him who had before recovered the advowson, unless some new cause had arisen which would entitle him to be heard again. Indeed, if an assize was summoned for that purpose, it would be barred by this answer to it: that the complaint or his ancestors had, it was true, the last presentation; but if he or his ancestors had any right, they lost it by a solemn judgment in court: and this being proved by the record of the court, the suit would be lost, and the complainant amerced.<sup>3</sup>

We have just seen that questions about presentations belonged to the bishop's court, though the right of advowson was cognizable only in the king's court. It sometimes happened, that when one clerk sued another clerk in the court christian they claimed a church by two different patrons. One of these patrons, not choosing to have a question upon his right agitated before that tribunal,

<sup>1</sup> *Vide ante*, pp. 54, 55.<sup>2</sup> Glanv. lib. 4, c. 10.<sup>3</sup> *Ibid.* c. 11.

might pray a writ *to prohibit* the court from proceeding, till the right of advowson was decided in the king's court. As this is the first mention we have of a prohibition to the ecclesiastical court, it may be proper to give this writ at length. It was as follows:—*Rex iudicibus, &c., ecclesiasticis salutem.* INDICAVIT nobis R. quòd cum J. clericus suus teneat ecclesiam, &c., in villâ, &c., per suam præsentationem, quæ de suâ advocacy est, ut dicit, N. clericus eandem petens ex advocacy M. milites, ipsum J. coram vobis in curiâ christianitatis inde trahit in placitum. Si verò præfatus N. ecclesiam illam dirationaret ex advocacy prædicti M. palàm est quòd jam dictus R. jacturam inde incurreret de advocacy suâ. Et quoniam lites de advocacy ecclesiarum ad coronam et dignitatem meam pertinent, vobis prohibeo, ne in causâ illâ procedatis, donec dirationatum fuerit in curiâ meâ, ad quem illorum advocatio illius ecclesiæ pertineat, &c.

If they proceeded in the cause after this prohibition, then the judges were summoned to appear in the king's court by the following writ: <sup>1</sup>—*Rex vicecomiti salutem.* Prohibe iudicibus, &c., ne teneant placitum in curiâ christianitatis de advocacy ecclesiæ, &c., unde R. advocatus illius ecclesiæ queritur quòd N. inde eum traxerit in placitum in curiâ christianitatis; quia placita de advocacy ecclesiarum ad coronam et dignitatem meam pertinent. Et summe per bonos summonitores ipsos iudices, quòd sint coram me vel justis meis die, &c., ostensuri quare placitum illud tenuerunt contra dignitatem meam in curiâ christianitatis. Summe etiam per bonos summonitores præfatum N. quòd tunc sit ibi ostensurus quare præfatum R. inde traxerit in placitum in curiâ christianitatis, &c.

The next action that demands our attention is that in which questions concerning a man's condition or state were agitated; as when one claimed a person to be his villein; or when one in a state of villenage claimed to be a free man. When one claimed a

<sup>The writ de</sup> man who was before in villenage, as his villein *nativus*, <sup>nativis.</sup> he had a writ *de nativis* directed to the sheriff; and so contested before the sheriff the matter with the other who was then in possession of the villein. If the question of villenage or not villenage was not moved before the sheriff, then the plea *de nativis* went on, as will be more fully shown presently. But if the villein said he was a free man, and he gave pledges to the sheriff that he would demonstrate it, then the suit in the county court ceased, because the sheriff was not allowed to determine that point; and if the sheriff persisted in going on to hear the cause, the villein was to make his claim to the justices, and would then obtain the king's writ, as follows:—*Rex vic. &c.* Questus est mihi R. quòd N. trahit eum ad villenagium de sicut ipse est liber homo, ut dicet. Et ideo præcipio tibi, quòd si idem R. fecerit te securum de clamore suo proseguendo, tunc PONAS loquelam illam coram me vel justitiis

<sup>1</sup> Glanv. lib. 2, c. 13.

*meis die, &c., et interem eum pacem inde habere facias: et sum-mone per bonos summonitores predictum N. quòd tunc sit ibi os-tensurus quare trahit eum ad villenagium injustè, &c.* It may be remarked, that this is the first writ of *pone* we have yet met with.<sup>1</sup>

The person who claimed the party as his villein, was also summoned by the same writ, and a day was fixed for him to prosecute his claim. At the day appointed, if the villein did not come nor send a messenger or *essoin*, they then proceeded, as we before mentioned, in *pleas*<sup>2</sup> where attachment lay. If he who claimed the party to be his villein neither came nor sent, the other was dismissed the court *sine die*. In the meanwhile, he who was claimed by both parties as his villein, was put, as Glanville expresses it, into *seisin of his freedom*; <sup>3</sup> that is, as in *pleas of land*, a *seisin* of the land in question was given as a process of contempt: so in this instance, an inchoate temporary possession of his freedom was given to the villein, till the parties could appear in court, and the question of right was fairly heard and determined.

If both parties appeared in court, the freedom was to be made out in the following way: The person who claimed to be free, was to bring into court his nearest relations, descended from the same stock with himself; and if their freedom was recognised and proved in court, this was construed in his favour, so as to free him from the yoke of servitude. But if the free state of those who were produced was denied, or there was any doubt concerning it, recourse was had to the vicinage, and according to their verdict it was adjudged by the court. In short, if there arose any doubt concerning the declarations of the relations, every doubt or difficulty of this kind was to be solved by the vicinage.<sup>4</sup>

When the freedom of the party was, by one or other of these ways, fairly made out, he was immediately released from the claim, and was adjudged free for ever. But if he failed in his proof, or if he was proved by the adversary to be a villein *nativus*, he was accordingly adjudged to belong to his lord, together with all his goods and chattels. There was the same form and course of proceeding in case of a supposed villein claiming his freedom, and a freeman being claimed as a villein. The person whose freedom was in question applied for a writ, to bring the suit into the king's court, and then it went on as has just been stated. It must be remarked, that the duel was not allowed in a suit to prove a man free *à nativitate*.<sup>5</sup>

The next action that comes under our consideration is the remedy a woman had to recover her dower. On the death of the husband, the dower, if it was a parcel of land named and specified, was either vacant or not. If it was vacant, the widow, with the assent of the heir, might take possession thereof,

<sup>1</sup> Glanv. lib. 5. c. 1, 2.

<sup>2</sup> Glanv. lib. 5, c. 3.

<sup>3</sup> *Per plegios attachiatis.*

<sup>4</sup> *Ibid.* c. 4,

*Vide ante*, 121.

<sup>5</sup> *Ibid.*



and hold herself in seisin. If part of it only was vacant, she might take possession of that, and for the remainder she might have her writ of right directed to her warrantor—that is, the heir of the husband. The writ was as follows:—*Rex M. salutem. Præcipio tibi quòd sine dilatione plenum rectum teneas A. quæ fuit uxor E. de unâ hidâ terræ in villâ, &c., quam clamat pertinere ad rationabilem dotem suam, quam tenet de te in eâdem villâ per liberum servitium decem solidorum per annum pro omni servitio, quam N. ei deforceat. Et nisi feceris, vicecomes faciat, ne oporteat eam amplius inde conqueri pro defectu recti, &c.*<sup>1</sup>

In pursuance of this writ, the plea went on in the lord's court, till proof was made of that court's failure in doing justice; upon which it was removed to the county court, and so to the king's court, if it seemed proper to him or his chief justice. The writ to remove it into the king's court was a *pone*, and was as follows:—*Rex vicecomiti salutem. Pone coram me vel justitiis meis die, &c., loquelam quæ est in comitatu tuo inter A. et N. de unâ hidâ terræ in villâ, &c., quam ipsa A. clamat versus prædictum N. ad rationabilem dotem suam. Et summane per bonos summonitores prædictum N. qui terram illam tenet, quòd tunc sit ibi cum loquelâ, &c.*<sup>2</sup>

This plea, as well as some others, might be removed from the county court to the *curia regis*, for many causes; as well on account of doubts which might have arisen in the county, and which they did not know how to decide upon (and on such cause of removal both parties were to be summoned) as at the prayer of one of the parties; and then it was sufficient, if only the party not removing it was summoned. If the suit was removed by the assent and prayer of both parties, being present in court, then there needed no summons, for both of them must know the day appointed.

If either or both parties were absent at the day appointed, they proceeded as before mentioned. When both parties appeared, the widow set forth her claim in the following words: *Peto, &c.* “I demand that land, as appertaining to such land which was named for me in dower; of which my husband endowed me *ad ostium ecclesiæ*, on the day he espoused me, as that of which he was invested and seised at the time when he endowed me.” To this claim the adverse party might make various answers: he might deny or admit that she was endowed of the land. But whatever was the answer given, the suit ought not to proceed without the widow's warrantor, that is, the heir of the husband; he was therefore summoned by the following writ: *Rex vicecomiti salutem. Summane per bonos summonitores N. filium et hæredem E. quòd sit coram me vel justitiis meis eâ die, &c., ad warrantizandum A. quæ fuit uxor ipsius E. patris sui unam hidam terræ in villâ, &c., quam clamat pertinere ad rationabilem dotem suam de dono ipsius*

<sup>1</sup> Glanv. lib. 6, c. 4, 5.

<sup>2</sup> *Ibid.* c. 6, 7.

*E. viti sui versus N. et unde placitum est inter eos in curiâ meâ si terram illam ei warrantizare voluerit, vel ad ostendendum ei quare id facere non debet, &c.* If the heir did not appear nor essoin himself, and was in contempt, there was a doubt what was the precise way for compelling him. Some thought he was to be distrained by his fee; others thought he was to be attached by pledges.<sup>1</sup>

If the heir, when he appeared, admitted what the widow alleged, he was bound to recover the land against the tenant in possession, and deliver it to the widow; and for this purpose the suit was continued between him and the tenant. If he declined prosecuting the suit, he was bound to give her an equivalent in recompense; for in all events the widow was to be no loser. If he denied what was alleged by the widow, the suit went on between him and her; and if she could produce those who heard and saw the endowment at the church-door, and was ready to deraign it against the heir, the matter might be decided by the duel: and if she prevailed, he must in that case also deliver to her the land in question, or a sufficient equivalent. It was a rule, that no woman could maintain any suit concerning her dower without her warrantor.<sup>2</sup>

This was the course for a widow to take, when she was obliged to sue for part of her dower: but when she could get possession of no part of it, and was put to sue for the whole, the suit was commenced originally in the *curia regis*, and the person who withheld her dower was summoned by the following writ, called a writ of dower *unde nihil habet*:—*Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilatione faciat habere A. quæ fuit uxor E. rationabilem dotem suam in villa, &c., quam clamat habere de dono ipsius E. viri sui, UNDE NIHIL HABET, ut dicit; et unde queritur quòd ipse ei injustè deforceat: et nisi fecerit, summe eum per bonos summonitores quòd sit dic, &c., coram nobis vel justitiis nostris, ostensurus quare non fecerit, &c.* Whoever was in possession of the land, whether the heir, or any other person, the presence of the heir, as was above laid down, was always necessary. If a stranger was in possession, he was summoned by this writ, and the heir by the above writ of summons *ad warrantizandum*.<sup>3</sup> The suit between the heir and widow might be varied, according as the heir pleased. If she claimed a certain assigned dower, he might deny any assignment, or deny that to be the land assigned. In both cases the proceeding was as above described. If only a reasonable dower was demanded, a third part was to be allotted her by the heir.<sup>4</sup> If more was assigned to her than a third part, a writ might be had directed to the sheriff, commanding him to admeasure it.<sup>5</sup>

<sup>1</sup> Glanv. lib. 6, c. 8-10.<sup>4</sup> *Ibid.* c. 17.<sup>2</sup> *Ibid.* c. 11.<sup>5</sup> *Ibid.* c. 17, 18.<sup>3</sup> *Ibid.* c. 14-16.

## CHAPTER IV.

### HENRY II. TO JOHN. (a)

*Of Fines—Of Records—Writ de Homagio recipiendo—Purpresture—De Debitis Laicorum—Of Sureties—Mortgages—Debts ex empto et vendito—Of Attornies—Writ of Right in the Lord's Court—Of Writs of Justicies—Writs of Replevin—and of Prohibition—Of Recognitions—Assisa Mortis Antecessoris—Exceptions to the Assize—Assisa Ultimæ Presentationis—Assisa Novæ Disseisinæ—Of Terms and Vacations—The Criminal Law—Of Abjuration—Mode of Prosecution—Forfeiture—Homicide—Rape—Proceeding before Justices Itinerant—The King and Government—The Charters—The Characters of these Kings as Legislators—Laws of William the Conqueror—Of the Statutes—Domesday Book—Glanville—Miscellaneous Facts.*

WE have hitherto been speaking of compulsory methods of re-  
covering and confirming rights; but it often hap-  
pened, as Glanville expresses it, that pleas moved in  
the king's court were determined by an amicable composition and  
final concord: this was always by the consent and licence of the  
king or his justices; and was done as well in pleas of land as other  
pleas. Such a concord used sometimes, by the assent of parties,  
to be reduced into a writing of several parts: from one of these  
was the agreement rehearsed before the justices in open court;  
and, in the presence of the justices, there was given to each party  
his part, exactly agreeing with the other's (b). The following is a  
specimen of such an instrument, literally translated from one in  
the reign of Henry II. "This is a final concord made in the court  
of our lord the king, at Westminster, on the vigil of the blessed  
Peter the apostle, in the thirty-third year of the reign of Henry II.  
before Ranulph de Glanvillâ, justiciary of our lord the king, and  
before H. R. W. and T. and other faithful and trusty persons of  
our lord the king, then there present; between the prior and  
brethren of the hospital of St Jerusalem, and W. T. the son of  
Norman, and Alan his son, whom he appointed as attorney in his  
stead in the court of our lord the king, *ad lucrandum et perden-*  
*dum* respecting all the land which the said W. held, with its ap-

(a) *Vide ante*, p. 149.

(b) As to fines or final concords, *vide ante*, p. 145. They were originally, no doubt, as Mr Hargreaves says, real concords of existing suits, and in that sense they are alluded to in the *Mirror*, c. iii. s. 167, "Of final accord"—"No law prohibits pleas nor accords, wherefore it is lawful for every one to release and quit-claim his right and his action." At what period fines or recoveries were fictitious, and used only as modes of assurance, is uncertain: but no doubt soon after the use of *records*, as to which *vide* p. 147.

purtenances, except one oxland and three tofts. Of all which land (except the said oxland and three tofts), there was a plea between them in the court of our lord the king; to wit, that the said W. and Alan concede and attest and quit-claim all that land from them and their heirs to the hospital and aforesaid prior and brethren for ever, except the said oxland and three tofts, which remain to the said W. and Alan, and their heirs, to be held of the said hospital, and the aforesaid prior and brethren, for ever, by the free service of fourpence *per ann.* for all service; and for this concession and attestation and quit-claim, the aforesaid prior and brethren of the hospital have given to the said W. and Alan an hundred shillings sterling."<sup>1</sup>

A concord or agreement of this kind was called *final*,<sup>2</sup> because *finem imponit negotio*; so that neither of the parties could recede from it. If one of the parties did not perform what he was thereby bound to do, and the other party complained of it; the sheriff would be commanded to put him by safe pledges, so as that he appeared before the king's justices, to answer why he did not keep the fine; that is, if the complainant had previously given security to the sheriff for prosecuting his claim. The writ was as follows:—*Præcipe N. quoddam justitiam et sine dilatione teneat finem factum in curia mea inter ipsum et R. de una hida terre in villa, &c., unde placitum fuit inter illos in curia mea: et nisi fecerit, et prædictus R. fecerit te securum de clamore suo presequendo, tunc pone eum per vadium et salvos plegios, quoddam sit coram me vel justitiis meis, ostensus die, &c., quare non fecerit, &c.*<sup>3</sup>

If he did not appear, nor essoin himself; or after the three essoins, if he did not appear, nor send his attorney, they were to proceed as was before shown in case of suits prosecuted by attachments. When they both appeared in court, if both parties acknowledged the writing containing the concord; or if the concord was stated to be such by the justices before whom it was taken, and this was testified by their record; then the party who had broke it was to be in the king's mercy, and to be safely attached till he gave good security to perform the concord in future; that is, either the specific thing agreed on, if it was possible; or otherwise, in some instances, what was equivalent: for it was invariably expected of every one who had acknowledged or undertaken anything in the king's court, in presence of him or his justices, ever after to observe such acknowledgment and undertaking. Moreover, had the final concord been made in a plea of land, then he who was convicted of breach of the fine, if tenant of the land, was *ipso facto* to lose the land. If one or both the parties denied the chirographum, then the justices were to be summoned to appear and *record*, says Glanville, in court the reasons why such a plea, between such parties of such land, ceased; and, if the parties came to a concord and agreement by their assent, what the form of that

<sup>1</sup> Glanv. lib. 8, c. 1, 2.<sup>2</sup> *Vide ante*, 145.<sup>3</sup> Glanv. lib. 8, c. 3, 4.

concord was. As to the method of making this record, there was this difference observed between a concord made in the king's chief court and that before the justices itinerant: if in the latter, then the justices were summoned, that they, with certain discreet knights of the county where the concord was made, who were present at making the concord, and knew the truth of the matter, should appear in court, there to make a record of the plea. Accordingly a writ to that effect was directed to the sheriff to summon the justices and knights.<sup>1</sup> Besides this, the sheriff of the county where the plea had been, was commanded to have the record of the plea then before the king or his justices by four discreet knights of the county. This is the first mention we have of the writ of *recordari*, so named from the words of it: *Præcipio tibi quod facias RECORDARI in comitatu tuo loquelam, &c.*<sup>2</sup> When the justices appeared, and had agreed upon the record, that record was to be abided by, neither party being allowed to make any exception to it; only, if such doubts should arise, which there was no possibility of removing, then the plea might be recommenced, and proceeded in afresh.<sup>3</sup>

Having said thus much of records of courts, it may be proper on this occasion to inquire a little further concerning these  
 Of records. muniments of judicial proceedings (*a*). No court had, generally and regularly, such remembrances of its proceedings as were called and esteemed records, except the king's court, that is, as it should seem, the court where the king's justices sat; though, by what we have just related, it should seem that the justices itinerant had not *regularly* a court of record. In other courts, if any one had said that which he would not willingly own, he might be permitted to deny it, in opposition to the whole court, by the oaths of three persons, affirming that he never said it; or by more or less, according to the custom of different courts.

In some special instances, however, county and other inferior courts had records; and that, as we are informed by our great authority, Glanville, by virtue of a law made by the council of the realm.<sup>4</sup> Thus, if in any inferior court duel was waged, and afterwards the plea was removed into the king's court, then the claim of the demandant, the defence of the tenant, the form of words in

(*a*) *Vide ante*, p. 147. "Qui placet in curia cujuscunque curia sit, excepto ubi persona regis est, et quis eum sistat super eo quod dixerit, rem quam nolit empteri si non potest disrationari per intelligentes homines qui interfuerunt placito, et videntes quod non dixerit, recuperet juxta verbum suum" (*Leges Will. i. c. 28*). "Et omnem recordationem domini regis curiæ non potest homo contradicere" (*Leges Hen. Primi, c. xlix. s. 4*). "Si plures alicujus homines simul implacentur secundum quod causæ fuerint vel pactum inter eos, de omnibus cura die simul vel de singulis sigillatim, rectum faciat: pactum eum legem vincit et amor judicium" (*Ibid. i. 5*). "Recordationem curiæ regis nulli negare licet: alias licebit per intelligentes homines placeti" (*Ibid. cxxxi. s. 4*).

<sup>1</sup> Glanv. lib 8, c. 5, 6.

<sup>2</sup> *Ibid.* c. 6, 7.

<sup>3</sup> *Ibid.* c. 8.

<sup>4</sup> When this law was made, we do not know; nor is it mentioned anywhere, that I know of, but in this passage of Glanville.

which the duel was awarded and waged ; of all these the court had a record, which was acknowledged as such by the king's court. But it had a record of nothing else, except only of the change of a champion : for if, after the removal of the plea into the king's court, another champion than he who had waged duel in the inferior court was produced, and a question arose upon it ; in this case also it was decided by the record of the inferior court, according to the direction of the statute before alluded to. Besides, any one might object to the record of an inferior court, declaring that he had said more than was now to be found in the record ; and that what he had so said he would prove against the whole court by the oaths of two or more lawful men, according as the usage of the court required ; for no court was bound either to maintain or defend its record by duel ; this, therefore, was the only proof that could be had. We are informed by Glanville, that a particular law<sup>1</sup> had been made, ordaining that no one should except to a record *in part*, and admit the remainder ; though he might deny *the whole* by oath, as just stated.<sup>2</sup>

The king might occasionally confer on any court the privilege to have a *record*. Thus, upon some reasonable cause being shown, he might, as has just been observed, direct a court to be summoned *to make a record* of a matter for the inspection of his own court ; so that, if the king pleased, there could be no contradiction admitted to such record. It often happened that a court was summoned to have the record of some plea before the king or his justices, although it had, in truth, no such record. In this case, the parties, by admission and consent, might settle a record of the matter between them. The writ on this occasion used to be of the following kind :—*Rex vicecomiti salutem. Præcipio tibi quòd FACIAS RECORDARI in comitatu tuo loquelam quæ est inter A. et B. de terrâ, &c., in villâ, &c., et habeas recordum illius loquæ coram me vel iustitiis meis ad terminum, &c., per quatuor legales milites, qui interfuerunt, ad recordum id faciendum. Et summe per bonos summonitores A. qui terram illam clamat, quòd tunc sit ibi cum loquelâ suâ, et B. qui terram illam tenet, quòd tunc sit ibi ad audiendum illud, &c.*<sup>3</sup>

Again, inferior courts had occasionally records of what was done there, which were transmitted to the king's court : as when a lord had a plea in his court of some doubt and difficulty, which could not be well determined there, then he might *curiam suam ponere in curiam domini regis*, as they called it, or adjourn the matter into the king's court, to have the advice of that tribunal what was proper to be done—an assistance which the king owed to all his barons. When a lord was in this manner certified what was advisable to be done, he returned with the plea, and proceeded to determine upon it in his own court. County courts had a record

<sup>1</sup> Of this law also, and the time when it was made, there is no remembrance but this slight intimation.

<sup>2</sup> Glanv. lib. 8, c. 9.

<sup>3</sup> *Ibid.* c. 9, 10.

of pledges, or sureties taken there, and of some few other matters.<sup>1</sup>

We before said that courts were not bound to defend their records by duel; but they were obliged to defend their *judgments* in that manner: as if any one should declare against a court for passing a *false judgment* against him, and should state it to be *therefore* false, because when one party said thus, and the other answered thus, the court gave a false judgment thereon in such and such words, and passed that judgment by the mouth of N., and should conclude, that if it was denied, he was ready to prove it by a lawful witness there ready to deraign it; in this case, the question might be decided by the duel. But there were some doubts whether the court was to defend its judgment by one of its own members, or by some stranger. Glanville seems to have been of the former opinion; for he says, the defence was to be by the person who passed the judgment. If the court was convicted in this manner, the lord of the court was in the king's mercy, and lost his court for ever; and besides this, the whole court was in the king's mercy.<sup>2</sup>

We shall now speak of the remedy the law allowed to compel a lord to receive the homage of his tenant, and so enable him to claim the protection consequent thereon.<sup>3</sup> If a lord would not receive the homage of the heir, nor a reasonable relief, then the relief was to be kept ready, and to be repeatedly tendered to the lord by good men: and if he would not at any rate accept it, the heir might complain of him to the king or his justices, upon which he would have this writ:—*Præcipe N. quòd justè et sine dilatione recipiat homagium et rationabile relevium K. de libero tenemento quod tenet in villâ, &c., et quòd de eo tenere clamat. Et nisi fecerit, summane, &c.*

The process against the defendant was the same as has often been mentioned before in cases of summons. If he appeared and acknowledged the complainant to be the heir, and confessed he had tendered his homage and relief, he was to receive it instantly; or appoint a day for doing it. The same was to be done, if he denied the tender, but admitted the complainant to be the heir; but if he denied he was the heir, then the heir, if he was out of seisin, might have an assize against the lord *de morte antecessoris*; if he was in seisin, he might hold himself in, till it pleased the lord to accept his homage; for the lord was not to have the relief till he had accepted homage. But if the lord doubted whether he was the lawful heir or not, and it had appeared to the vicinage that he was not, the lord might then take the land into his own hands, till it was made appear whether he was the heir. And this was the way in which the king always dealt with his barons: for the king, upon the death of a baron holding of him in chief, immediately retained

<sup>1</sup> Glanv. lib. 8, c. 11.

<sup>2</sup> *Ibid* c. 9.

<sup>3</sup> We have before seen how important it was for the heir that the lord should receive his homage. *Vide ante*, 175.

the barony in his own hands, till the heir gave security for the relief; and this, notwithstanding the heir was of full age.<sup>1</sup>

Lords might defer receiving homage and relief, upon reasonable cause shown; as suppose some other person than the heir pretended a right to the inheritance, or any part of it; for while that suit depended, he could not receive homage or relief. Another cause was, when the lord thought he had a right to hold the inheritance in demesne. In such case, if he commenced a suit by the king's writ, or that of his justices, against the person in seisin of the land, the tenant might put himself upon the king's great assize, which proceeded much in the way we before stated, as will appear by the following writ:—*Rex vicecomiti salutem. Summone per bonos summonitores quatuor legales milites de vicineto villæ, &c., quod sint coram me vel justitiis meis die, &c., ibi, ad eligendum super sacramentum suum duodecim, &c., qui melius rei veritatem sciunt, et dicere velint, ad faciendam recognitionem, utrum N. majus jus habet tenendi unam hidam terræ in villâ, &c., de I. vel ipse R. tenendi eam in dominico suo, quam ipse R. petit per breve meum versus prædictum N. et unde N. qui terram illam tenet, posuit se in assisam meam, et petit recognitionem fieri, utrum ille majus jus habeat tenendi terram illam in dominico, vel prædictus N. tenendi de eo. Et summone per bonos summonitores prædictum N. qui terram illam tenet, quod tunc ibi sit auditurus illam electionem, &c.*<sup>2</sup>

If a lord could not, by distress or otherwise, compel his tenant to render his services and customs legally due, recourse was then had to the king or his chief justice, from whom he might obtain the following writ to the sheriff, directing that he himself should see justice done to the complainant; which is the first instance we have yet mentioned of the form of a writ of *justicies*:—*Præcipio tibi quod JUSTICIES N. quod justè et sine dilatione faciat R. consuetudines et recta servitia quæ ei facere debet de tenemento suo quod de eo tenet in villâ, &c., sicut rationabiliter monstrare poterit cum sibi deberi, ne oporteat eum amplius inde conqueri pro defectu recti, &c.* In pursuance of this writ, the sheriff, in his county court, held a plea of the matter in question, and the party complaining might therein recover his services and dues, according to the custom of the county. If he made out his right, the other party, besides rendering what was due, was in the mercy of the sheriff; for the *misericordia* or *amercement* which arose out of any suit in the county court always went to the sheriff. The *quantum* of this was ascertained by no general law, but depended on the custom of different counties, and the opinion of the persons who assessed it (a).<sup>3</sup>

(a) But it ought to be reasonable. Thus, Henry I., in his charter, admitted that amercements had been grievous, and promised that they should be henceforth reasonable: “Si quis baronum vel hominum meorum forisfecerit, non dabit vadium in misericordia totius pecunie suæ, sicut faciebat tempore patris mei et fratris mei, sed secundum modum forisfacii, ita emendabit sicut emendasset retro a tempore

<sup>1</sup> Glanv. lib. 9, c. 4-6.

<sup>2</sup> Ibid. c. 6, 7.

<sup>3</sup> Ibid. c. 8-10.



Next, as to the remedy to be pursued in case of purprestures.

*Purpresture*, or, according to Glanville, *porpresture*. *Purpresture*. was, when any unlawful encroachment was made upon the king, as intruding on his demesnes, obstructing the public ways, turning public waters from their course, or building upon the king's highway:<sup>1</sup> in short, whenever a nuisance was committed upon the king's freehold, or the king's highway, a suit concerning such nuisance belonged to the king's crown and dignity (a). These purprestures were inquired of either in the chief court of the king, or before the king's justices, who were sent into different parts of the kingdom for the purpose of making such inquisitions, by a jury of the country, or of the vicinage.<sup>2</sup> Whosoever was convicted by a jury of having committed such purprestures, was in the king's mercy for the whole fee he held of the king, and was obliged to restore what he had encroached upon. If the purpresture consisted in building in some city upon the king's street, the edifice, says Glanville, so built, was forfeited to the king, and the party remained in the king's mercy. The *misericordia domini regis*, which has been so often mentioned, is explained in this passage by Glanville to be, when any one is to be amerced by the oaths of twelve lawful men of the vicinage; so, however, *ne aliquid de suo honorabili contentemento amitit*, as not to lose his *countenance*, or appearance in the world. When any purpresture was committed against a private person, it was considered in a different way. If it was against the lord of the fee, and not within the provisions of the statute about assizes, then the transgressor was made to appear in the lord's court, provided he held any tenement of him. This was by the following writ:—*Rex vicecomiti salutem. Præcipio tibi quòd justicies N. quòd sine dilatione veniat in curiâ I. domini sui, et ibi stet ei ad rectum de libero tenemento suo quòd super eum occupavit, ut dicit, ne oporteat*, &c.<sup>3</sup> If, upon this writ, he was convicted of the purpresture in the lord's court, he lost, without recovery, the freehold he held of the lord.

patris mei et fratris mei, in tempore aliorum antecessorum meorum" (*Leges Hen. Pri.*, c. 1; *A.-S. L.*, v. i. p. 500). How utterly, therefore, Henry II. violated all law in the case of Archbishop A'Becket, when, upon a supposed contempt in non appearance in court—though he sent four knights to represent him and excuse his absence—he was declared to have forfeited the whole of his goods and chattels, may easily be judged (*Hume's Hist. Eng.*, vol. i. c. 8). And so outrageous were the exactions of the Norman sovereigns under the pretence of amercements, that a special clause was introduced into Magna Charta to repress them (*Vide post, et vide 2 Inst.* 27).

(a) "It is properly when there is a house built or an enclosure made of any part of the king's demesnes, or of a highway, or a common street, or public water, or such like public thing. It is derived of the French *pourpris*, which signifieth an enclosure" (*Co. Litt.* 277 b.). It might be committed, as understood by our legal authorities—(1) against the king by a subject, (2) by a tenant against his lord, (3) by one subject against another (*Spelm. Gloss.*, and in *Cowell's Interpret.* *Manwood's Forest Laws*, p. 119). The word used by Glanville is "occupation," and Lord Coke says "occupationes" are taken for usurpations upon the king, and, in a large sense, includes purprestures as well as intrusions and usurpations (*2 Inst.* 272).

<sup>1</sup> *Regiam plateam*.

<sup>2</sup> *Per juratam patriæ sive vicinetti*.

<sup>3</sup> Glanv. lib. 9, c. 11, 12.

If he held no freehold of the lord, then the lord might implead him by a writ of right in the court of the chief lord. In like manner, if any one committed a purpresture upon a person not his lord, and the fact did not come within the provision about assizes, he might be impleaded in a writ of right. But if it was within that law, then there should be a recognition upon the novel disseisin to recover seisin; of which proceeding we shall have occasion to speak more hereafter. In these purprestures it usually happened that the boundaries of lands were broke in upon and confounded; upon which, at the prayer of any of the neighbours, the following writ might be issued:—*Rex vicecomiti salutem. Precipio tibi quòd justè et sine dilatione facias esse rationabiles divisas inter terram R. in villâ, &c., et terram Ade de Byri sicut esse debent, et esse solent, et sicut fuerunt tempore regis Henrici avi mei, unde R. queritur quòd Adam injustè, et sine judicio, occupavit plus inde quàm pertinet ad liberum tenementum suum de Byri; ne amplius inde clamorem audiam pro defectu justitiæ, &c.*<sup>1</sup>

We have hitherto treated of the remedies in use for vindicating a right to land, and its appendant services and profits. We shall now take leave of this subject for a while, and consider the nature of personal contracts, such as buying, selling, giving, lending, and the like, upon which there arose *debts* and obligations to pay. This subject is entitled, in the language of this period, *De debitis laicorum*, to distinguish it from those debts <sup>coram.</sup> and dues that were recoverable in the ecclesiastical courts, as being things of a supposed spiritual nature, such as money due by legacy, or upon promise of marriage.<sup>2</sup>

Pleas, therefore, *de debitis laicorum* belonged to the king's crown and dignity. If any one complained to the *curia regis* of a debt owing to him, which he was desirous should be inquired of in that court, he had the following writ of summons:—*Rex vicecomiti salutem. Precipe N. quòd justè et sine dilatione reddat R. centum marcas quas ei debet, ut dicit, et unde queritur quòd ei deforceat. Et nisi fecerit, summo cum per bonos summonitores, quòd sit coram me vel justitiis meis apud Westmonasterium, à clauso Paschæ in quindecim dies, ostensurus quare non fecerit, &c.* This was the form of the writ of debt.

The manner of enforcing an appearance to this writ was as in other cases of summons. It should be observed here, that it was not usual for the *curia regis* in any case to compel obedience to a writ by distraining the chattels; therefore, even in a plea like this, the defendant might be distrained by his fee and freehold, or, as in some other suits, by attachment of pledges.<sup>3</sup>

When they were both in court, then it was to be considered how the demand arose. This might be of various kinds, as *ex causâ mutui*, upon a borrowing; *ex causâ venditionis*, upon a sale; *ex*

<sup>1</sup> Glanv. lib. 9, c. 13, 14.<sup>2</sup> For this *vide* Fleta, p. 131.<sup>3</sup> Glanv. lib. 10, c. 1-3.

*commodato*, upon a lending ; *ex locato*, upon a hiring ; *ex deposito*,<sup>1</sup> upon a deposit ; or by some other cause by which a *debt* arose ; for, at this time, all matters of personal contract were considered as binding only in the light of *debts* ; and the only means of recovery, in a court, was by this action of debt.

A debt arose *ex mutuo*, when one lent another anything which consisted in number, weight, or measure. If a person, upon such a lending, received back again more than he lent, it was usury ; and if he died under the reputation of an usurer, we have seen the infamy with which his memory was stained. A thing was sometimes lent *sub plegiorum datione* ; that is, some one was surety for the restoration of it ; sometimes, *sub vadii positione*, that is, a pledge was given ; sometimes, *sub fidei interpositione*, when a bare promise was made for the return ; sometimes, *sub chartæ expositione*, when a charter was made acknowledging such lending ; and sometimes with all these securities together.

When anything was owing *sub plegiorum datione* only, if the principal debtor had not wherewithal to pay, recourse was had to the sureties by the following writ :—*Rea vicecomiti salutem. Præcipe N. quoddam justè et sine dilatione acquietet R. de centum marcis versus N. unde eum applegiavit, ut dicit, et unde queritur quoddam eum non acquietavit inde. Et nisi fecerit, summone eum per bonus summonitores, &c.*<sup>2</sup> If the sureties appeared in court, and confessed the suretyship, they were then obliged to pay the debt at certain times affixed in court, unless they could show that they were released from their engagement, or had in some way satisfied the demand. Sureties, if more than one, were held to be severally bound for the whole (unless there had been some special agreement to the contrary), and they were both to be proceeded against for satisfaction ; therefore, should any of them be insufficient, the remainder were to be answerable for the deficiency. If the sureties, however, had specially engaged for particular parts of the payment, it was otherwise. There might arise a dispute between the creditor and the sureties, or between the sureties, upon this point. In like manner, if some of the sureties engaged for the whole, and some for parts only, then the former would have a question to debate with the latter. In what manner all these points were to be proved, will be seen presently. When the sureties had paid what was due, they might

<sup>1</sup> It is almost unnecessary to remark, that these expressions are all borrowed from the civil law : the same may be said of the definitions hereafter given of these different obligations ; but, notwithstanding this, the matter of Glanville's discourse upon the subject of debts and obligations bears no resemblance to the imperial jurisprudence. This is one strong and very remarkable circumstance to show, that the use made of the Roman law by our old writers was not to *corrupt*, but to adorn and elucidate our municipal customs. *Vide* Inst. lib. iii. tit. 15.

<sup>2</sup> This writ was, in after times, called *de plegiis acquietandis*, and used to be brought by the sureties against the principal debtor ; though in the time of Glanville we find it lay for the creditor against the surety, F. N. B. It must be confessed, the wording of it in Glanville seems more adapted to the modern than the ancient application of the writ.

resort to the principal by a new action of debt, as will be shown hereafter. However, it should be remarked, if any one had become surety for a person's appearance in a suit, and he had fallen into the king's mercy for the default of the principal, he could not recover by action of debt against the principal what he had so paid; for it was a rule, that should any one become surety for a person's answering in the king's court, in any suit belonging to the king's crown and dignity, as for breach of the peace, or the like, he fell into the king's mercy, if he did not produce the principal; but he was thereby, notwithstanding, released from the engagement as a surety, and therefore there could be no further proceeding instituted thereon.<sup>1</sup>

If some of the sureties denied they were sureties, and some confessed it, then the question would be as well between the creditor and the sureties as between the sureties themselves. There was a doubt what should, in this case, be the mode of proof; whether by duel, or whether the sureties were to deny their engagement by the oaths of such number of persons as the court should require. Some thought that the creditor himself, by his own oath, and that of lawful witnesses, might make proof of it against the sureties, unless the sureties could avoid his oath by any lawful objection; and if so, says Glanville, they must resort to the duel.<sup>2</sup>

Things were lent sometimes *sub vadii positione*; and then either movables, as chattels, or immovables, as land, tenements, and rents, were given in pledge. A pledge was either given at the time of lending, or not. It was given sometimes for a certain term, sometimes without any fixed term; sometimes in *mortuo vadio*, sometimes not. *Mortuum vadium*, or *mortgage*, was when the fruits, or rent arising therefrom, did not go towards paying off the demand for which it was pledged (*a*). When movables were pledged, and seisin thereof, as it is called, given to the creditor for

(a) The *Mirror* affords a much better explanation by analogy to distresses, which are a kind of pledge, and which it divides into *dead* distresses, as armour, or robes, or jewels, and *live* distresses, as cattle or sheep (c. 2, s. 26). It is singular that so easy an explanation has not occurred to any writer since the time of the *Mirror*. A mortgage is always a *dead* pledge; that is literally the meaning of the phrase, for "gage" or "vadium" is synonymous with pledge, and a distress is only a pledge compulsorily taken, and so it is said in the chapter of the *Mirror* that a man unlawfully takes away a live distress against gages and pledges, as a live distress is not to be taken away, &c. It is not easy to understand the explanation above given, which is copied from Glanville, and of which the author offers no explanation. In our day, rents received, of course, do, *pro tanto*, go in satisfaction of the debt. Littleton's explanation is, "If a feoffment be made upon condition, that if the feoffor pay to the feoffee at a certain day a certain sum, then the feoffor may enter: in this case, the feoffee is called tenant in mortgage, *i.e.*, it is *mortuum vadium*, because it is doubtful whether the feoffor will pay at the day limited or not, and if he doth not pay, then the land which is put in pledge is taken from him for ever, and so dead to him, and if he doth pay, then the pledge is dead to the tenant" (*Litt.*, b. 2, c. 5; *Co. Litt.*, 205, a). The explanation probably is this—that in ancient times the mortgages were actually forfeited at the day, and the intermediate rents and profits were looked upon in the light of a fine or penalty, or as interest for the delay, which was not very long. This appears by a subsequent passage to be the explanation.

<sup>1</sup> Glanv. lib. 10, c. 3-5.

<sup>2</sup> *Ibid.* c. 6.

a certain term, the law required that he should safely keep it, without using it so as to cause any detriment thereto; and if any detriment happened to it within the term appointed, it was to be set off against the debt, according to the damage sustained. If the thing pledged was such as necessarily required some expense and cost, as to be fed or repaired, perhaps there would be some agreement between the parties about it, and that agreement was to be the rule of such contingent expenses. It was sometimes agreed, that if the pledge was not redeemed at the term fixed, it should remain to the creditor, and become his property. If there was no such agreement, the creditor might quicken the redemption by the following writ:—*Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilacione acquietet, &c., quam invadiavit R. pro centum marcis usque ad terminum qui præterit, ut dicit, et unde queritur quòd eam nondum acquietavit: et nisi fecerit, &c.*<sup>1</sup>

It was doubted by Glanville in what manner the defendant was to be compelled to appear to this writ; whether he was to be distrained by the pledge itself, or in what other way. This, it seems, was left to the discretion of the court, and might be effected either by that or some other method. He ought, however, to be present in court before the pledge was quit-claimed to the creditor; for he might be able, perhaps, to show some reason why it should not. If he then confessed his having pledged the thing, as he thereby in effect confessed the debt, he was commanded to redeem it in some reasonable time; and if he did not, the creditor had licence to treat the pledge as his own property. If he denied the pledging, he must either say the thing was his own, and account for its being transferred out of his possession, as lent or intrusted to him, or deny it to be his; and then the creditor had licence to consider it as his own property. If he acknowledged it was his, but denied the pledge and debt both, then the creditor was bound to prove both; and the manner of proof, where pledges denied their suretyship, we have before mentioned. But the debt could not be demanded before the expiration of the term agreed upon.<sup>2</sup>

If the pledge was made without mention of any particular term, the creditor might demand his debt at any time. When the debt was paid, the creditor was bound to restore the pledge in the condition he received it, or make satisfaction for any injury that it had received; for it was a rule that a creditor was to restore the pledge, or make satisfaction for it; if not, he was to lose his debt.<sup>3</sup>

When it happened that a debtor did not make delivery of the pledge at the time of receiving the thing lent, Glanville doubts what remedy there was for the creditor, as the same thing might be pledged, both before and after, to several persons; for it must be observed, says our author, that it was not usual for the *court of our lord the king* to give protection to, or warrant private agreements about giving or receiving things in pledge, or about other

<sup>1</sup> Glanv. lib. 10, c. 8.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

matters, if made out of court, or if made in other courts than *that of our lord the king*: and therefore, when such conventions were not observed, the *curia regis* would not entertain any suit for the establishment of them. The debtor, therefore, could not be put to answer about the priority of pledging, and <sup>1</sup> the person who was the loser by it must content himself with the consequence of his own negligence.

When a thing immovable was put in pledge, and seisin thereof given to the creditor for a certain term, (a) it was generally agreed between them whether the rents and profits Mortgages. should, in the meantime, go towards the discharge of the debt, or not. An agreement of the first kind was considered as just and binding, the latter as unjust and dishonest, and was the *mortuum vadum*, or *mortgage* before mentioned. Though this was not wholly prohibited by the king's court, yet it was reputed as a species of usury, and punishable in the way before mentioned. In other respects, the rules of law respecting this pledge were the same as those before stated in the case of a movable, when pledged. It must be added, that should the debtor pay the debt, and the creditor still detain the pledge, the debtor might have the following writ to the sheriff:—*Precipe N. quod justè et sine dilatione reddat R. totam terram illam in villâ, &c., quam ei invadiavit pro centum marcis ad terminum qui præterit, ut dicit, et denarios suos inde recipiat*; OR, *quam ei acquietavit, ut dicit: et nisi fecerit, summane eum per bonos, &c.*<sup>2</sup> The creditor, upon his appearance in court, would either acknowledge the land to be given in pledge, or would claim to hold it in fee. In the first instance, he ought to restore it, or show a reasonable cause why he should not. In the second, it was put either at the prayer of the creditor or debtor, upon the recognition of the country, whether the creditor had the land in fee or in pledge, or whether his father or any of his ancestors was seised thereof, as in fee or in pledge, on the day he died; and so the recognition might be varied many ways, according as the demandant claimed, or the tenant answered to that claim. But if a recognition was prayed by neither party, the plea went on upon the right only.<sup>3</sup>

If the creditor by any means lost his seisin, whether through the debtor or through any one else, he could not recover seisin by any judgment of the court, nor by a recognition of novel disseisin; but if he was disseised of his pledge unlawfully, and without judg-

(a) It is to be observed, that in Glanville's time (says Sir W. Blackstone), when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or a pledge of lands was good unless possession was also delivered to the creditor, and having referred to this passage, which is copied from Glanville, he adds, "And the frauds which have arisen since the exchange of these public and notorious conveyances for more private and secret bargains have well evinced the wisdom of our ancient laws" (2 *Black. Comm.* 159). *Quia sine traditione non transferentur rerum dominia* (*Bracton*, 61, b).

<sup>1</sup> Glanv. lib. 10, c. 8.

<sup>2</sup> *Ibid.* c. 8, 9.

<sup>3</sup> *Ibid.* c. 10.

ment of any court, the debtor himself might have an assize of novel disseisin: and should he have been disseised by the debtor himself, he had no way of getting possession again but through the debtor; for he must resort to the principal plea of debt, to compel the debtor to make him satisfaction.<sup>1</sup>

Thus far of proving a debt by sureties and by pledge; but where the creditor had neither of these to prove his demand, nor any other proof, but only the faith or promise of the debtor, this was held no sufficient proof in the king's court; but he was left, says Glanville, to his suit in the court christian *de fidei læsione vel transgressione*, for breach of promise. Though the ecclesiastical judge might take cognizance of this as a criminal matter, and inflict a penance upon the party, or enjoin him to make satisfaction; yet we have seen that he was prohibited by one of the constitutions of Clarendon, to draw into that jurisdiction, and determine questions concerning lay-debts or tenements, upon pretence of any *promise* having been made respecting them.<sup>2</sup>

If then the creditor had neither sureties nor pledge, he was driven to find some other proof. He might make out the matter either *per testem idoneum*, *per duellum*, or *per cartam*, i.e., by a fit witness, or by the duel, or by a charter. If the debtor's charter or that of his ancestor was produced, and he did not acknowledge it, he might controvert it several ways. Perhaps he might admit it to be his seal, but deny that the charter was made by him or with his assent; or he might deny the charter and seal both. In the first case, if he acknowledged publicly in court the seal to be his, so great regard was had to a seal, that he was thereby considered as having acknowledged the charter itself, and was bound to observe the covenants therein contained; it being his own fault, if he suffered any injury for want of taking care of his own seal. In the latter case, the charter might be proved in the duel by a fit witness, particularly by one whose name was inserted as a witness in the charter. There were other ways of establishing the credit of a charter; as by showing other charters signed with the same seal, which were known to be the deeds of the person who denied this; and if the seals, upon comparison, appeared exactly the same, it was held as a clear proof; and the party against whom it was to operate lost his suit, whether it related to debts, land, or any other matter: and he was moreover to be *in misericordiâ* to the king; for it was a general rule, that when a person had said anything in court or in a plea which he again denied, or which he could not warrant, or bring proof of, or which he was compelled to gainsay by contrary proof, he always remained *in misericordiâ*. If a person had given more securities than one for a debt, they might all be resorted to at once; otherwise many securities would not be of more benefit than one.<sup>3</sup>

We have hitherto been speaking of lending and borrowing; we

<sup>1</sup> Glanv. lib. 10, c. 11.

<sup>2</sup> *Ibid.* c. 12. *Vide ante*, 78.

<sup>3</sup> *Ibid.* c. 12.

come now to a debt arising *ex commodato*: as if one lent another a thing *without any gratuity*, to use and derive a benefit from it; when that use and benefit was attained, the thing was to be restored without detriment; but if the thing perished, or was damaged in his keeping, a recompense was to be made for the damage sustained: but how this damage was to be valued, and if the thing was lent for a certain term, or to be used in a certain place, how a recompense was to be made, should he exceed that term and deviate from that place; or how that excess was to be proved, or whose property the thing was to be considered, Glanville signifies his doubts; only as to the property, he thought that retaining the thing beyond the stated time and place could not well be called *furtum*, or stealing; because he had possession of it originally through the right owner. Glanville also doubted whether the owner, if he had any use for it himself, might demand his thing so lent before the time was expired, or before any breach of the agreement as to the place.<sup>1</sup>

Next as to debts arising *ex empto et vendito*. A sale was considered as effectually completed when the price was agreed upon, so as there was a delivery of the thing sold, or the price paid, in part or in the whole, or that at least earnest was given and received (*a*). In the first two cases, neither of the contracting parties could recede from the bargain, unless on a just and reasonable cause; as if there had been an agreement at first that either might declare off within a certain time; for in this case, the rule of law operated, that *conventio vincit legem*. Again, if the thing was sold as sound and without fault, and afterwards the buyer could prove the contrary, the seller was bound to take it back; however, it would be sufficient if it was sound at the time of the contract, whatever might afterwards happen: but Glanville had a doubt within what time complaint was to be made of this, particularly where there was no special agreement about it. Where earnest was given, the purchaser might be off his bargain, upon forfeiting his earnest; but if the seller, in this case, wanted to be off, Glanville doubted whether he might, without paying some penalty, for otherwise he would be in a better condition than the purchaser, though it was not easy to say what penalty he was to pay. In general, all hazard respecting the thing sold was to rest with him who was in possession of it at the time, unless there was some special agreement to the contrary.<sup>2</sup>

(*a*) When there is neither writing, earnest, nor delivery, says Bracton, the parties may retract property, not having passed quia sine traditione non transferentur rerum dominia (*Bracton*, 61, *b*). The earnest was given by the civil law as symbol of the contract or part of the price, as Vinnius says. In the former case, the purchaser could not avoid the rule by forfeiture; in the latter, he could (*Deg.*, 18, 1-35, 19, 1-11, 1). It is curious that, after the lapse of centuries, during which the common law as it had thus existed, had become obsolete, it was virtually restored by the statute of Frauds in the reign of Charles II., by which either delivery, writing, or part payment is required to bind a contract of sale of goods above the value of £10.

<sup>1</sup> Glanv. lib. 10, c. 13.

<sup>2</sup> *Ibid.* c. 14.



In all sales of immovables, the seller and his heirs were bound to warrant the thing sold to the purchaser and his heirs, and upon that warranty he or his heirs were to be impleaded, in manner as we before stated. And if any movable was demanded by action against the purchaser, as being before sold or given, or by some other mode of transfer conveyed to another (so as no felony was charged to have been committed of it), the same course was observed, says Glanville, as in case of immovables; but if it was demanded of the purchaser *ex causâ furtivâ*, he was obliged to clear himself of all charge of felony, or call a person to warrant the thing bought. If he vouched a *certain* warrantor to appear within a reasonable time, a day was to be fixed in court. If the warrantor appeared, but denied his warranty, then the plea went on between him and the purchaser, and they might come to the decision of the duel. Glanville made a question whether such a warrantor might call another warrantor; and if so, what limit was to be set to this vouching to warranty. In this case of calling a *certain* warrantor, when a thing was demanded *ex causâ furtivâ*, the warrantor used not to be summoned, as in other cases of warranty; but on account of the particular nature of this charge, he was attached by the following writ to the sheriff:—*Præcipio tibi, quòd sine dilatione attachiari facias per salvos et securos plegios N. quòd sit coram me vel iustitiis meis die, &c., ad warrantizandum R. illam rem quam H. clamat adversus R. ut furtivam, et unde prædictus R. eum traxit ad warrantum in curiâ meâ, vel ad ostendendum quare ei warrantizare non debeat, &c.*<sup>1</sup>

This was the proceeding if he called a *certain* warrantor whom he could name. But if, in the phrase of that time, he called an *uncertain* warrantor—that is, if he merely declared that he bought the thing *de legitimo mercatu suo*, fairly and honestly, and could produce sufficient proof thereof, he was cleared of the charge of felony, as far as he might be affected criminally; not so, however, but that he might lose the thing in question, if it was really stolen, though not by the defendant. This was the method of proceeding, if any of these special circumstances arose; but if it rested upon the mere debt, that is, whether *ex empto* or *ex commodato*, it was made out by the general mode of proof used in court, namely, says Glanville, that by writing or by duel.<sup>2</sup>

A debt *ex locato* and *ex conducto* accrued, when one let out a thing to another for a certain time, at a certain reward; here the person letting was bound to impart the use of the thing letten, and the hirer to pay the price. In this case, the former might, at the expiration of the time, take possession of the thing letten by his own authority solely; but Glanville made it a question whether, if the price was not paid according to the agreement, he might deprive the hirer of possession by his own authority. But all these being what were then called private contracts, lying in the

<sup>1</sup> Glanv. lib. 10, c. 15, 16.

<sup>2</sup> *Ibid.* c. 17.

knowledge of the parties only, without any evidence to testify their existence, were such, as was before observed,<sup>1</sup> of which the king's court did not usually take cognizance; others, which were *quasi private*, hardly met with more consideration from the king's court.<sup>2</sup> This seems to have been a remarkable part of the jurisprudence of these times; and to have stood in need of the improvement afterwards, though very slowly, adopted in actions upon promises.

Thus have we gone through those actions which were commenced originally in the *curia regis*, all which were called actions *de proprietate*. As these might be attended by the parties themselves, or by their attorneys, it seems proper in this place to say something upon the law respecting attorneys (*a*). These Of attorneys. pleas, as well as some other civil pleas, might be prosecuted by an attorney; or, as he was called in those times, *responsalis ad lucrandum vel perdendum*. A person, when he appointed such *responsalis*, or attorney, ought to be present, and make the appointment in open court before the justices sitting there upon the bench; and no attorney ought to be received otherwise than from the principal then in court, though it was not necessary that the adverse party should be present at the time, nor even the attorney, provided he was known to the court. One person might

(*a*) The word used by Glanville, from whom all this is copied, is *responsalis*, and from some expressions in Bracton and Fleta, it has been conjectured that an attorney, an essoiner, and a *responsalis* differed in some respects (*Bracton*, 212, *b*; *Fleta*, lib. vi. c. 11, *b*. 7). And of this opinion was Lord Coke (*Co. Litt.*, 128, *a*). But these changes of expression, or even of meaning, may merely mark the gradual course of a usage. The terms used in the civil law for attorney would probably be procurator, but that is a more general phrase, and the term "*responsalis*" is used in *Justinian's Novella* in the sense of an officer sent with a special commission, and Glanville is speaking of the special function of representation in a court, and in a particular suit. Appearance used to be personal, and it is curious that among the "abuses" specified in the *Mirror*, is that appearance by attorney was allowed (*Mirror*, c. 5, s. i.) "It is an abuse to answer or appear by attorney" (*Ibid.*, art. 138), but it is also said, "It is an abuse to receive an attorney where the plea is not to be judged in the presence of the parties" (art. 103); and again, "It is an abuse that no one can make an attorney in personal actions, where corporal punishment is to be awarded" (art. 104); and again, "It is an abuse to receive an attorney where no power to do so is given by writ out of the Chancery" (art. 102). It is not easy to understand the precise meaning and force of these objections, but it is manifest that attorneys did appear in court, and it is plain, from other passages, that they were quite different from essoiners. "It is an abuse that an essoiner is admitted in a personal action" (art. 100). There is a distinct chapter, however, upon "attorneys," following that upon essoiners, which shows that they were closely connected. "Before a plea put into court by essoins, attachment, or by appearance—essoins being excuses for non-appearance—none is to be received by attorney, nor is any to be received by attorney in a suit not pending, but only in a suit pending in the county court or elsewhere. All may be attorneys which the law will permit: women may not be, nor infants, nor villeins. Plaintiffs, notwithstanding they have attorneys in personal actions, are not to appear or answer in judgment by attorney (*Ibid.*, c. ii. s. 31). Elsewhere, it is said that attorneys who yield up the inheritance or freehold of their clients in judgment fall into the offence of wrongful disseisin, for it behoveth not attorneys to lose their clients' rights, but to defend them, until a rightful judgment is given (*Ibid.*, c. ii. s. 26). It appears that accountants in the exchequer were usually obliged to come in person (*Madox's Exch.*, c. xxvii. s. 5).

<sup>1</sup> *Vide ante*, 212.

<sup>2</sup> *Glanv. lib. 10, c. 13.*

be appointed attorney, or two, jointly or severally; so as, if one was not present to act, another might; and by such an attorney a plea might be commenced and determined, whether by judgment or by final concord, as effectually as by the principal himself. It was not enough that any one was appointed bailiff or steward for the management of another's estate and affairs, to entitle him to be received as his attorney in court; but he must have a special authority for that particular purpose, to act in that particular cause, *ad lucrandum vel perdendum*, for him in his stead. It was the practice to appoint in the *curia regis* an attorney to act in a cause depending in some other court; and there then issued a writ of the following kind, commanding the person appointed to be received as such:—*Rex vicecomiti* (or whoever presided in the court) *salutem: Sciens quòd N. posuit coram me* (or, *justitiis meis*) *R. loco suo ad lucrandum vel perdendum pro eo in placito, &c., quod est inter eum et R. de unâ carucatâ terræ in villâ, &c.; et ideo tibi præcipio quòd prædictum R. loco ipsius N. in placito illo recipias ad lucrandum vel perdendum pro eo, &c.*<sup>1</sup>

When a person was appointed attorney, he might cast essoins for the principal (and for him only, not for himself) till his appointment was vacated. When an attorney was appointed, and had acted in a cause, Glanville puts a question, whether his principal could remove him at his pleasure and appoint another, particularly if there had arisen any great disagreement between them. And he thought that the principal had that power; an attorney being put in the place of another only in his absence; and the practice was to remove an attorney at any part of a cause, and appoint another in court, in the form above mentioned.<sup>2</sup>

A father might appoint his son his attorney, an instance of which we saw in the fine above stated, and so *vice versâ*; and a wife might appoint a husband. When a husband acted as attorney to his wife, and lost anything in a plea of *maritagium* or dower, or gave up any right of the wife's, whether by judgment or final concord, it was made a question by Glanville, whether the wife could afterwards institute any suit for it, or was bound, after her husband's death, to abide by what he had done. And it should seem, says he, that she ought not in such case to lose anything by the act of her husband; because, while she was *in potestate viri*, she could not *contradict* him, or contravene his acts; and therefore could not, unless he pleased, attend to her own property and concerns; and yet, adds our author, it might be said on the other side, that whatever is transacted in the king's court ought to be held firm and inviolable.<sup>3</sup> Abbots and priors of canons regular used to be received as attorneys for their societies, of course, without letters from their convent; other priors, whether of canons or monks, if they were cloistered, even though they were aliens, were never received in court without letters from their abbot or chief

<sup>1</sup> Glanv. lib. 11, c. 1, 2.<sup>2</sup> *Ibid.* c. 3.<sup>3</sup> *Ibid.*

prior. The master of the Temple, and the chief prior of the hospital of St John of Jerusalem were received of themselves, but no inferior persons of their order. When one or more were appointed attorneys in the above manner, it was made a question by Glanville, whether one might appoint his colleague to act for him, or some third person, *ad lucrandum vel perdendum*.<sup>1</sup>

The principal might be compelled to fulfil everything that was done by his attorney, whether by judgment or final concord; though it was settled beyond a question or doubt, that upon the default or inability of the principal, the attorney was not liable.<sup>2</sup> When it is said that the principal must be present in court to appoint his attorney, it must be remembered what was before laid down—namely, that if a tenant did not appear after the third essoin, but sent an attorney, such attorney should be received; but this was allowed for the necessity of the thing, as he was compelled by the judgment of the court, or by process of distress, to put some one in his place *ad lucrandum vel perdendum*.

The foregoing writs of right were commenced directly and originally in the *curia regis*, and were there determined. There were some writs of right which were not brought there originally, but were removed thither, when it had been proved that the court of the lord where they were brought had *de recto defecisse*, as it was called, or failed in doing justice between the parties; and, in that case, such causes might be removed into the county court, and from thence into the *curia regis*, for the above reason.<sup>3</sup>

When, therefore, any one claimed freehold land, or service, held of some other person than the king, he had a writ of right directed to his lord, of whom he claimed to hold the land, to the following effect:—*Rex comiti W. salutem. Præcipio tibi, quòd sine dilatione teneas plenum rectum N. de decem hidis terræ in Middleton, quam clamat tenere de te per liberam servitium fiedi unius militis pro omni servitio. Et nisi feceris, vicecomes de Northampton faciat, ne amplius inde clamorem audiam pro defectu justitiæ, &c.* The form of these writs was capable of infinite variety, according to the subject and circumstances of the demand.<sup>4</sup> Glanville says nothing upon the order and course of conducting these pleas in the lord's court, except intimating that they depended on the custom of the particular court<sup>5</sup> where they were brought.

The way of proving a court *de recto defecisse*, to have failed in doing justice was this: The demandant made his complaint to the sheriff in his county court, and there showed the king's writ; upon this, the sheriff sent some officer of his to the lord's court, on the day appointed by the lord for the parties to appear, that he, in the presence of four or more lawful knights, who were to be present by the sheriff's command, might hear and see the demandant make proof that the

<sup>1</sup> Glanv. lib. 11, c. 5.<sup>4</sup> *Ibid.* c. 3-5.<sup>2</sup> *Ibid.* c. 4.<sup>5</sup> *Ibid.* c. 6.<sup>3</sup> *Ibid.* lib. 12, c. 1.

court *de recto defecisse* ; this proof was to be by his own oath, and the oaths of two others swearing with him to the fact. By this solemnity were causes removed out of many courts into the county court, and were there heard over again, and finally determined, without the lord or his heirs being allowed to make any claim for recovery of their judicature, as far as concerned that cause. Should a cause be removed before it had been proved in the above manner that there was a failure of justice, the lord might, on the day appointed for hearing the cause, make claim of cognizance, and for restoration of his court ; but this was never done in the *curia regis*, unless he had claimed it three days before, in the presence of lawful men, it not being suitable to the dignity of that court to be ousted, upon slight grounds, of the cognizance of a cause once entertained there. If no day was appointed in the lord's court, and therefore proof of failure of justice could not be made in the above way, the complainant might *falsare curiam*, falsify the court, or deprive it of its cognizance, by making that proof anywhere within the lord's fee, if the lord did not reside usually there ; for though a lord could not hold his court without his fee, he might by law have it anywhere within it ; if he did reside there, it was probably to be made at his mansion-house.<sup>1</sup>

The writ of right, of which we have just spoken, was to be directed to the lord, of whom the demandant claimed to hold immediately, not to the chief lord. But it might sometimes happen that the demandant claimed to hold the thing in question of one lord, and the tenant claim to hold of another ; in this case, because one lord should not be enabled to dispossess another of his court and franchise, the suit of necessity belonged to the county court ; and from thence it might be removed to the *curia regis*, where both lords might be summoned, and their several rights discussed in their presence, as we before mentioned in cases of warranty.<sup>2</sup>

We have said that the above mentioned writs of right belonged to the sheriff, upon failure of the lord's court. Of writs of justicies ; To the sheriff also belonged several other suits, one of which, namely, that *de nativis*,<sup>3</sup> we have already mentioned. In short, all causes where the writ of the king or his justices directed him to do right between the parties (called since writs of *justicies*), and such as contained the provisional clause *quòd si non rectum fecerit, tunc ipse facias, &c.*, all these gave the sheriff a judicial authority to hear and determine.<sup>4</sup> These writs were very numerous ; some of them are mentioned by Glanville, from whom may be extracted a short account, that will give an idea of this provincial judicature. There was a writ directed to a lord, commanding him *ne injustè vexes*, by demanding more services than were due ; and unless he desisted, the sheriff was commanded to see right done.<sup>5</sup> This is the only provisional writ ; the rest are all peremptory, directed to the sheriff solely. One was to give posses-

<sup>1</sup> Glanv. lib. 12, c. 7.    <sup>2</sup> *Ibid.* c. 8.    <sup>3</sup> *Vide ante*, 198.    <sup>4</sup> Glanv. c. 9.    <sup>5</sup> *Ibid.* c. 10.

sion of a fugitive villein and his chattels;<sup>1</sup> for admeasurement of pasture which was superonerated;<sup>2</sup> *quòd permittat habere* certain easements;<sup>3</sup> to make *rationabiles divisas*;<sup>4</sup> to observe a *rationabilem divisam* of chattels that had before been made;<sup>5</sup> to respite a recognition directed to be taken by the justices;<sup>6</sup> a *facias habere rationabilem dotem*; to take care of a deceased man's chattels for payment of his debts;<sup>7</sup> and to give possession of chattels that had been taken at a disseisin of the land, after the land had been recovered in an assize of novel disseisin.<sup>8</sup> To these we must add writs of *replevin*, and two of *prohibition* to the ecclesiastical court, which deserve to be mentioned more at length.

In the former part of this inquiry into judicial proceedings, we have seen that when land was seised into the king's hand for default or contempt of the tenant, he might within a certain time replevy his land, upon performing what was required of him by the court. The power of distraining, which lords exercised over their tenants, required a similar qualification—either that the tenant should perform what was due, or at least till it was ascertained by judgment whether anything or what was due, he should replevy; that is, have a return of his goods *upon pledges* given as a security to stand to the award of justice in the matter. In order to effect this, several writs of *replegiare* or *replevin* were devised. One was in this form, and seems to approach nearest to the modern writ of replevin:—*Rex vicecomiti salutem. Præcipio tibi, quòd justè et sine dilatione FACIAS HABERE G. AVERIA SUA PER VADIUM ET PLEGIUM; unde queritur, quòd R. EA CEPIT ET DETINET INJUSTE pro consuetudinibus quas ab eo exigit, quis ipse non cognoscit se debere; et ipsum præterea inde justè deduci facias, ne oporteat eum, &c.*<sup>9</sup> The next is in the nature of a prohibition, as well as a writ of replevin, though it is not properly a prohibition, which was always to prohibit a judicial proceeding. It is as follows:—*Rex vicecomiti salutem. Prohibeo tibi ne permittas quòd R. injustè exigat ab S. de libero tenemento suo quod tenet de N. de fædo ipsius R. in villà, &c., plus servitii quàm pertinet ad illud liberum tenementum quod tenet; et AVERIA SUA QUÆ CAPTA SUNT pro illa demandâ, quam ille non cognoscit ad liberum tenementum suum, quod tenet, pertinere, ei REPLEGIARI FACIAS donec loquela illa coram nobis audiat, et sciatur utrùm illud servitium debeat vel non, &c.*<sup>10</sup>

To these may be added the two writs of prohibition to the ecclesiastical court, just alluded to:—*Rex, &c., judicibus ecclesiasticis salutem. Prohibeo vobis ne teneatis placitum in curiâ christianitatis quod est inter N. et R. de laico fædo prædicti R. unde ipse queritur quòd N. eum trahit in placitum in curiâ christianitatis coram vobis, quia placitum illud spectat ad coronam et dignitatem meam, &c.*<sup>11</sup> Besides this writ to the judges,

<sup>1</sup> Glanv. lib. 12, c. 11.<sup>2</sup> *Ibid.* c. 13.<sup>3</sup> *Ibid.* c. 14.<sup>4</sup> *Ibid.* c. 16.<sup>5</sup> *Ibid.* c. 17.<sup>6</sup> *Ibid.* c. 19.<sup>7</sup> *Ibid.* c. 20.<sup>8</sup> *Ibid.* c. 18.<sup>9</sup> *Ibid.* c. 12.<sup>10</sup> *Ibid.* c. 15.<sup>11</sup> *Ibid.* c. 21.

there went also an attachment against the party suing in the court christian, to the following effect:—*Rex vicecomiti salutem. PROHIBE R. ne sequatur placitum in curiâ christianitatis quod est inter N. et ipsum de laico fædo ipsius prædicti N. in villâ, &c., unde ipse queritur, quòd præfatus R. inde cum traxit in placitum in curiâ christianitatis coram iudicibus illis. Et si præfatus N. fecerit te securum de clamore suo proseguendo, tunc PONE PER VADIUM ET SALVOS PLEGIOS prædictum R. quòd sit coram me vel iustitiis meis die, &c., ostensurus quare traxit eum in placitum in curiâ christianitatis de laico fædo suo, in villâ, &c., de sicut illud placitum spectat ad coronam et dignitatem meam, &c.*<sup>1</sup> The manner of ordering the before-mentioned suits in the county court, depended on the customs of different counties; for which reasons, as well as because it was not strictly within the design of his work, there is no notice in Glanville.<sup>2</sup>

Before we leave the subject of writs of right, it will be proper to add some observation respecting the form of writs and of the proceedings thereon. The form of words in which a title to land was stated by the demandant, was called his *petition*,<sup>3</sup> or demand, from the word *peto*, with which it begun. It sometimes happened that the writ contained more or less in it than the *petitio* stated to the court, as to the appurtenances of the land, or particular circumstances of the case. Sometimes there was an error in the writ as to the name of the party, or the *quantum* of service, or the like. When the writ contained less than the petition, no more could be recovered than was stated in the writ; but when the writ contained more than the petition went for, the surplus might be remitted, and the remainder might well be recovered by the authority of that writ. If, however, there was any error in the name, then by the strictness of law another writ should be prayed: again, when there was an error in stating the *quantum* of service, the writ was lost. Suppose a writ of right, directed to the lord, stated the land to be held by less services than were really due, Glanville thought that, in such case, the lord could not refuse to receive the writ, and proceed upon it, under pretence of his being concluded thereby, and suffering a detriment to his service; but he was left to make good his claim of service against the demandant, should he recover against the tenant.<sup>4</sup> This is all that is to be collected from Glanville on the formal part of *Pleading*; a branch of our law which grew, in after times, to such a size, and was considered with so much nicety and refinement.

It had become the law and custom of the realm, says Glanville, that no one should be bound to answer in his lord's court concerning his freehold, without the precept or writ of our lord the king, or his chief justice, if the question was about a lay fee; but if there was a suit between two clerks concerning a freehold held in frankal-

<sup>1</sup> Glanv. lib. 12, c. 22.

<sup>2</sup> *Ibid.* c. 23.

<sup>3</sup> This term is borrowed from the civil and canon law, where it is used in a similar sense. The *petitio* is called *count* in our law French.

<sup>4</sup> Glanv. lib. 12, c. 22.

moigne, or if a clerk should be tenant of ecclesiastical land held in frankalmoine, whoever might chance to be demandant against him, the plea concerning the right ought, in such case, to be *in foro ecclesiastico*; unless it should be prayed to have a recognition *utrum fœdum ecclesiasticum sit vel laicum*, whether it was an ecclesiastical or lay fee, of which we shall say more hereafter; for then that recognition, as well as all others, was had in the king's court<sup>1</sup>

We have now dismissed the proceedings for the recovery of *rights*, with all their incidents and appendages, as far as any of recognition intimation upon this subject has come down to us.

The next thing that presents itself to our consideration, is the method of recovering *seisin*, or mere possession. The remedies for recovery of *seisin* seem to be founded on the policy of preserving peace and quiet in matters of property. As *seisin* was the *primâ facie* evidence of right, the law would not allow it to be violated on pretence of any better right: and had provided many ways of proceeding to vindicate the *seisin*, sometimes in opposition to the mere right. As questions concerning *seisin* came within the benefit of the late statute of Henry II., to which we have so often before alluded, and were accordingly in general decided by *recognition*, we shall therefore speak of the different kinds of recognitions.<sup>2</sup>

One of those recognitions was called *de morte antecessoris*; another, *de ultimâ presentatione*; another, *utrum tenementum sit fœdum ecclesiasticum vel laicum*; another, whether a person was seised at the day of his death *ut de fœdo*, or *ut de vadio*; another, whether a person was within, or of full age; another, whether a person died seised *ut de fœdo*, or *ut de wardâ*; another, whether a person made the last presentation to a church by reason of being seised in fee or in ward; and the like questions, which often arose in court between parties; and which, as well by the consent of parties as by the advice of the court, were directed to be inquired of in this way, to decide the fact in dispute. There was one recognition which stood distinguished among the rest, and was called *de novâ disseisinâ*, of novel disseisin.<sup>3</sup> We shall speak of all these in their order.

First, of the recognition *de morte antecessoris*, which seems to be a proceeding particularly calculated for the protection of heirs against the intrusion made by their lords, upon the death of the ancestor last seised (a). If any one died seised of land, and was seised *in dominico suo sicut de fœdo suo*; that is, had

(a) Before Magna Charta, says Lord Coke, the writs of assize, of novel disseisin, or mort d'ancestor, were returnable either *coram rege*, or into the court of common pleas, and this appeareth by Glanville, "*coram me vel coram justitiariis meis.*" But after Magna Charta, the writs were returnable, "*coram justitiariis nostris ad assisas cum in partes illas venerint*" (2 *Inst.* 24). The "ancestor" meant not merely a parent, but brother, sister, uncle, aunt, nephew, or niece of the claimant (*Bruton*, 254, 261; 3 *Inst.* 399).

<sup>1</sup> Glanv. lib. 12, c. 25.

<sup>2</sup> *Ibid.* lib. 13, c. 1.

*Ibid.* c. 2.



the inheritance and enjoyment thereof to him and his heirs; the heir might demand the seisin of his ancestor by the following writ:—*Rex vicecomiti salutem. Si G. filius T. fecerit te securum de clamore suo prosequendo, tunc summane per bonos summonitores duodecim liberos et legales homines de vicineto de villâ, &c., quod sint coram me vel justitiis meis die, &c., parati sacramento recognoscere, si T. pater prædicti G. fuit seisitus in dominico suo sicut de fædo suo, de unâ virgâto terræ in villâ, &c., die qua obiit; si obiit post primam coronationem meam, et si ille G. propinquior hæres ejus est. Et interim terram illam videant, et nomina eorum imbrevari facias. Et summane per bonos summonitores R. qui terram illam tenet, quod tunc sit ibi auditurus illam recognitionem. Et habeas ibi summonitores, &c.* This writ was varied in some parts of it, according to the circumstances under which the person died seised; as, whether he was seised the day he undertook a peregrination to Jerusalem, or St Jago, in which journey he died; or the day he took upon him the habit of religion, the latter being a civil death, which entitled the heir to succeed immediately.<sup>1</sup> If the heir was within age, the clause "*si G. filius T. fecerit te securum de clamore suo prosequendo*" was left out, the infant not being able, by law, to bind himself in any security; as was also the clause, "*si T. pater prædicti G. obiit post primam coronationem meam.*"<sup>2</sup>

When the sheriff had received this writ, and the demandant had given security in the county-court for prosecuting his claim,<sup>3</sup> they proceeded to make an assize in this way: Twelve free and lawful men of the vicinage were chosen, according to the direction of the writ. This was in the presence, perhaps, of the parties; though it might be in the absence of the tenant, provided he had been properly summoned to attend: for he should always be once summoned, to hear who were chosen to make the recognition; and, if he pleased, he might except to some upon any reasonable cause. If he did not come at the first summons, they did not wait for him; but the twelve jurors were elected in his absence, and sent by the sheriff to view the land or tenement whose seisin was in dispute: and Glanville says, that the tenant was to have one summons more. The sheriff caused the names of the twelve to be inserted in a writ;<sup>4</sup> then summoned the tenant to be present at the day appointed by the writ, before the king or his justices, to hear the recognition. The tenant might esoin himself at the first and second day (provided the demandant was not an infant), but there was no esoin allowed him at the third day; for then the recognition was taken, whether he came or not; it being a rule, that no more than two essoins should be allowed in any recognition upon a seisin only; and in a recognition upon a novel disseisin, there was no esoin at all. At the third day, then, the assize was taken,

<sup>1</sup> Glanv. lib. 13. c. 2, 3, 4, 6.

<sup>3</sup> *De clamore suo prosequendo.*

<sup>2</sup> *Ibid.* c. 5.

<sup>4</sup> *Imbrevari.*

whether the tenant came or not. If the jurors declared for the demandant, the seisin was adjudged to him, and a writ of the following kind went to the sheriff to give execution thereof: *Scias quòd N. dirationavit in curiâ meâ seisinam tantæ terræ in villâ, &c., per recognitionem de morte antecessoris sui versus R. et ideo tibi præcipio quòd SEISINAM illam ei sine dilutione HABERE FACIAS, &c.*<sup>1</sup>

By force of this writ he recovered not only seisin of the land, but seisin of all the chattels and everything else which was found upon the fee at the time of seisin being made by the sheriff. When the seisin was in this manner recovered, the person who lost might afterwards, notwithstanding, contest the right, in a writ of right; but Glanville doubted how long after the seisin so delivered he might pursue his remedy for the right.<sup>2</sup> If the oath of the jurors was in favour of the tenant, and he was absent, the seisin remained to him, without the adverse party having any power to recover it: though this did not take away his cause of action for the right, as in the former case; nor, on the other hand, did a suit depending upon the right to a tenement, extinguish a recognition upon the seisin of one's ancestor, unless the duel was waged upon the right; though the pursuing such a recognition was a sort of contempt of court; the punishment, however, of which Glanville seems to think was not ascertained.<sup>3</sup>

When both parties appeared in court, it used to be asked of the tenant if he could say anything why the assize should *remanere*, as they called it; that is, should be barred, <sup>Exceptions to the assize.</sup> or not proceed. Many good causes might be shewn why the assize should *remain*. If the tenant confessed in court, that his ancestor, whose seisin was in question, was seised in his demesne as of fee, the day he died, with all the circumstances expressed in the writ, there was no need to proceed in the assize; but if he confessed the seisin only, and denied all, or some circumstances, the assize proceeded upon those circumstances which were not admitted.

There were many other causes upon which the assize *mortis antecessoris* used to remain. The tenant might admit, that the demandant was seised after the death of his father, or some other ancestor (whether such ancestor was seised the day of his death or not); and that being in such seisin, he did such or such an act which deprived him of the benefit of the assize; as for instance, that he sold the land to him, or made a gift of it, or quit-claimed it, or made some other lawful alienation thereof: and upon these points, says Glanville, they might go to the trial by duel, or any other kind of proof which was usually allowed by the court in questions of right. In like manner, the tenant might say, that the demandant had heretofore commenced a suit against him concerning the same land, and that there was then a fine made between them in the king's court; or that the land fell to him upon a final decision

<sup>1</sup> Glanv. lib. 13, c. 7, 8.<sup>2</sup> *Ibid.* c. 9.<sup>3</sup> *Ibid.* c. 7.

by duel, whether the duel was in the king's court or any other ; or that it was his by the judgment of some court, or by quit-claim solemnly made. Villenage might be objected against the demandant ; and, if proved, it took away the assize ; as did also the exception of bastardy, and the king's charter confirming to the tenant the land in question ; the conjunction of more heirs than one, as of women in a military fee, and of men and women together in free socage. Again, if it were admitted, that the ancestor whose seisin was in question had a seisin of some sort or other, namely, that he had it from the tenant or his ancestor, either in pledge, or *ex commodato*, or by any similar means, in these cases the assize was to remain, and the plea to proceed in some other way. Consanguinity was an exception which took away the assize.

Where it happened, as we before mentioned in speaking of frank-marriage, that the eldest brother gave part of his land to his younger brother, who died without heirs of his body ; in such case, the assize would remain, on account of the rule before stated, that *nemo potest hæres simul esse ejusdem tenementi et dominus*. In like manner, if the demandant either confessed, or was proved to have been in arms against the king, any assize which he might bring against another would, *ipso facto*, remain. We are told also by Glanville, that by force of a particular law,<sup>1</sup> burgage-tenure was a good exception to cause the assize to remain. When none of these, nor any other cause was stated why the assize should remain, the recognition proceeded in form, and both parties being there present, the seisin was tried by the oaths of the twelve jurors, and, according to their verdict, was adjudged to one party or the other.<sup>2</sup>

When the demandant in this assize was an infant, and the tenant was of full age, the tenant was not allowed an essoin, and the recognition proceeded the first day, whether the tenant appeared or not. It was so ordered for this never-failing reason, that wheresoever the tenant, if present in court, could say nothing why the assize should remain, the recognition ought, by law, to proceed, without waiting for the appearance of the adverse party. Now, in this case, if the tenant was present, the allegation of the demandant's infancy would be no cause for the assize to remain, and therefore the recognition was to proceed of course ; but if restitution was made to the infant by the recognition, the minor's coming of age was to be expected, before he could be made to answer upon the question of right, should any be moved against him. The course was the same where both parties were minors.<sup>3</sup>

But where the demandant was of full age, and the tenant a minor, it was different, for there the minor might essoin himself in the usual way : and when he appeared, he might pray that the recognition might not be taken till he was of full age ; and thus the recognition *de morte antecessoris* often remained, on account of the

<sup>1</sup> This is another law alluded to by Glanville, of which we find no other mention.

<sup>2</sup> Glanv. lib. 13, c. 11.

<sup>3</sup> *Ibid.* c. 12.

age of one of the parties. To procure, however, this delay, the minor must say that he was in seisin of the tenement in question ; and also, that his father or some other ancestor died seised : for neither a recognition, nor a suit upon the right, would remain as against a minor, if he himself had acquired seisin of the tenement, and he held it by no other right than what he had so made to himself. But should it be replied to what the minor had said, that true it was his ancestor died seised of the tenement in question, yet it was not *ut de feodo*, but only *ut de wardâ* ; then, though the principal recognition would remain on account of the age of the minor, yet a recognition would proceed on that point, and a writ of summons would accordingly issue for twelve jurors to the following effect: *Rex vicecomiti, &c., Summone per bonos summonitores duodecim liberos et legales homines de vicineto de villâ, &c., quòd sint coram me vel justitiis meis ad terminum, &c., parati sacramento recognoscere si R. pater N. qui infra ætatem est, seisitus fuit in dominico suo de unâ carucata terræ in villâ, &c., unde M. filius et hæres T. petit recognitionem de morte ipsius T. patris sui versus ipsum N. ut de feodo suo die quâ obiit, vel ut de wardâ. Et interim terram illam videant, et nomina eorum imbreviari facias. Et summone per bonos summonitores prædictum N. qui terram illam tenet, quòd sit ibi auditurus illam recognitionem, &c.*<sup>1</sup>

In this case, the proceeding somewhat differed from other instances of recognitions ; for if a day had been given to both parties, there was then no summons to the tenant to hear the recognition ; but it proceeded without delay, and according to the verdict of those twelve jurors, delivered upon their oaths, it was declared what sort of seisin the ancestor had ; and if it was only *ut de wardâ*, the demandant recovered against the minor. But Glanville doubts whether this was enough to entitle the demandant to recover ; for, as yet, it did not appear that his ancestor died seised in his demesne as of fee, nor that he was the next heir ; and he puts it as a question, whether recourse was to be had to the principal recognition upon that point. However that might be, yet in case it had been proved by the oaths of the twelve jurors, that the ancestor of the minor died seised as of fee, then the seisin was to remain to the minor till he attained his full age ; but after he was come of age, the other party might bring in question *the right* either against him or his heirs. It should be remembered, that it was only in the above case that a recognition was allowed to proceed against a minor ; for it was a general rule, that a minor was not bound to answer in any suit by which he might be disinherited, or lose his life or member, except that he was obliged to answer to suits for his debts, and also for a novel disseisin. If, in the above case, the seisin had been adjudged to the demandant, restitution was to be made in the form before mentioned ; and he, in like manner, could not be compelled to answer the minor upon *the right* till he was of

<sup>1</sup> Glanv. lib. 13, c. 13, 14.

full age. Such mutual permission to stir questions, after a determination, was grounded upon this prevailing reason, that whatever was transacted with persons under age, in pleas of this sort, ought not to remain fixed and unalterable.<sup>1</sup>

If a person claimed the privilege of a minor, and it was objected to him that he was of full age, this was to be decided by the oaths, not of twelve, but of eight free and lawful men, who were summoned by a similar writ with those we have so often mentioned for summoning jurors: *octo liberos, et legales homines de vicineto de villâ, &c., &c., recognoscere, utrûm N. qui clamat unam hidam, &c., sit talis ætatis, quòd inde placitare possit et debeat. Et interim terram illam videant, et nomina eorum, &c. &c.*<sup>2</sup> If he was proved by this recognition to be of full age, they proceeded to the principal recognition, as in other cases. Here Glanville makes a question, whether he was thenceforward to be esteemed of full age, so as to lose his privilege of age as against all other persons: and again, suppose he had been found a minor, whether that was sufficient, without more, to entitle him to the privilege in all other suits.<sup>3</sup>

The next recognition is that *de ultimâ præsentatione*. When *Assise ultime* a church was void, and a dispute arose about the *præsentationis* presentation, the controversy might be determined by this recognition, at the prayer of either party. The writ, in such case, was of the following kind:—*Summone, &c., duodecim liberos et legales homines de vicineto, &c. &c., parati sacramento recognoscere, quis advocatus præsentavit ultimam personam, quæ obiit ad ecclesiam de villâ, &c., quæ vacans est, ut dicitur, et unde N clamat advocacionem. Et nomina eorum imbreviari facias. Et summone per bonos summonitores R. qui præsentationem ipsam deforceat, quòd tunc sit ibi auditurus illam recognitionem, &c.*<sup>4</sup> What the essoins were in this recognition, may be collected from what has gone before. The person to whom or to whose ancestors the last presentation was adjudged by the recognition, was considered as having thereby obtained seisin of the advowson; so that he was to present to the first vacancy, and his parson was to hold the presentation during his life, whatever was the fact about *the right of* advowson; for the person who lost the last presentation by a recognition might yet move a question upon the right of advowson.<sup>5</sup>

The tenant might, in this as well as the foregoing writ, state some reason why the assise should not proceed. He might say that he admitted the ancestor of the demandant made the last presentation, as the real lord and heir; but that afterwards he transferred the fee, to which the advowson was appendant, to the tenant or his ancestors, by a good and lawful title: upon which allegation the assise would remain, and either party might pray a recognition upon the truth of this exception. Again, either party might admit

<sup>1</sup> Glanv. lib. 13, c. 15.

<sup>4</sup> *Ibid.* c. 18, 19.

<sup>2</sup> *Ibid.* c. 15, 16.

<sup>5</sup> *Ibid.* c. 20.

<sup>3</sup> *Ibid.* c. 17.

that he or his ancestors made the last presentation, but that it was *ut de wardâ*, not *ut de fædo*; upon which a recognition might be prayed, which would be summoned by a writ similar to the many we have mentioned: *duodecim liberos, &c., recognoscere, si R. qui præsentavit, &c., fecerit illam presentationem ut de fædo, vel ut de wardâ, &c.* And if the recognition declared the last presentation was made *ut de wardâ*, the advowson of the presentation was at an end, and henceforth belonged to the other party; if *ut de fædo*, the presentation remained to him.<sup>1</sup>

We come now to the recognition concerning a tenement, *utrùm sit laicum vel ecclesiasticum*, which might be had upon the prayer of either party. For summoning such a recognition, there issued a writ like the former: *recognoscere, utrùm una hida terre, quam N. persona ecclesie de villâ, &c., clamat ad liberam elemosinam ipsius ecclesie sue versus R. in villâ, &c., sit laicum fædum ipsius R. an fædum ecclesiasticum. Et interim terram videant, &c.*<sup>2</sup> It was a rule in this, and indeed in all others, except the great assize, that no more than two essoins should be had, for the third was never admitted; but where the court could be certified of the party's illness, whether he was *languidus* or not; and as this, says Glanville, was not usually done in recognitions, they always were without a third essoin. This recognition proceeded in the same way as the former; and if it was proved by the recognition that the tenement was ecclesiastical, it could not afterwards be considered as a lay fee, though it might be claimed as holden by the church for a certain service.<sup>3</sup>

The next was the recognition, whether a person died seised *ut de fædo, vel ut de vadio*. If a person claimed a tenement as having been pledged by him or his ancestors, and the other party claimed it not as a pledge, but in fee, then a recognition was resorted to, and was summoned, as in other cases: *recognoscere, utrùm N. teneat unum carucatum, &c., in fædo, an in vadio, &c.*, or it might be, *utrùm illa carucata, &c., sit fædum vel hæreditas ipsius N. an invadiata ei ab ipso R. vel ab ipso H. antecessore ejus. Et interim terram videant, &c.*<sup>4</sup> Sometimes, when a person died seised *ut de vadio*, the heir, upon such seisin, would bring a writ *de morte antecessoris* against the true heir, who had by some means got seisin of the land; and then, if the tenant admitted the seisin of the demandant's ancestor, but said it was *ut de vadio*, and not *ut de fædo*; a recognition was summoned in the following form: *recognoscere, utrùm N. pater R. fuerit seisitus in dominico suo ut de fædo, an ut de vadio, de unâ carucatâ, &c., die quâ obiit, &c.*<sup>5</sup>

If it was proved by the recognition to be a pledge only, and not an inheritance, then the tenant who claimed it as his inheritance lost the tenement; so that he could not even make use of it, in the

<sup>1</sup> Glanv. lib. 13, c. 20-22.

<sup>4</sup> *Ibid.* 26, 27.

<sup>2</sup> *Ibid.* c. 23, 24.

<sup>5</sup> *Ibid.* c. 28, 29.

*Ibid.* c. 25.

manner we mentioned concerning actions of debt, for the recovery of the debt for which it was a pledge. If, on the other hand, it was recognised to be an inheritance in the tenant, the demandant could recover it no other way (if at all) than by a writ of right. Glanville makes a question, whether in this, or any other recognition, the warrantor was to be waited for, particularly if he was vouched after two essoins had been had.<sup>1</sup>

The nature of the recognitions which remain to be mentioned, may partly be collected from those of which we have already treated, and partly from the terms of the award made in court for their being taken, and the allegations of both parties, which were to be tried. Indeed, some of them have been already noticed; as that for trying whether a person was of age;<sup>2</sup> that for trying whether a person died seized *ut de feodo*, or *ut de wardâ*;<sup>3</sup> that for trying whether a presentation was made in right of the inheritance, or only in right of a wardship:<sup>4</sup> all these recognitions were conducted as the others, in respect of essoins, and they proceeded or remained for the same reasons as prevailed in the rest.<sup>5</sup>

It must be observed of these *assizes* (for so they are sometimes called by Glanville, but more commonly *recognitions*), that they are not all of the same kind; that *de morte antecessoris* being evidently an original proceeding, independent of any other; the rest (not excepting that *de ultimâ presentatione*,<sup>6</sup> and that *utrum laicum feodum vel ecclesiasticum*) being merely for the decision of facts which arose in some original action or proceeding. Thus, the writs for summoning recognitions of the latter kind were simple writs of summons: they mentioned that a plea was depending in court by the king's writ; and they were granted at the prayer of either party; so that they seemed to be resorted to, by the assent of parties, for settling an incidental question, on which they put the dispute between them. On the other hand, the writ *de morte antecessoris* has all the appearance of an original commencement of a suit. It issued only upon condition that the demandant gave security to prosecute it—*si G. filius T. fecerit te securum de clamore suo prosequendo TUNC summo*—and made no mention of a plea depending. Of the same kind was the writ *de novâ disseisinâ*, which will be mentioned presently. Thus, then, of all the assizes in use in Glanville's time, it was only that *de morte antecessoris*, and that *de novâ disseisinâ*, that were original writs. Whether there were any recognitions for trying collateral facts, besides those mentioned in Glanville, it is difficult to determine; this being one of the many circumstances of which we must

<sup>1</sup> Glanv. lib. 13, c. 30.

<sup>2</sup> *Ibid.* c. 15-17.

<sup>3</sup> *Ibid.* c. 13-15.

<sup>4</sup> *Ibid.* c. 20-22.

<sup>5</sup> *Ibid.* c. 31.

<sup>6</sup> That the assize *de ultima presentatione* was such, see what we have before said, p. 197, in the plea upon a right of advowson, where this writ is awarded to try a collateral matter, arising in a writ of right of advowson.

remain ignorant, for want of knowing the terms of the famous law made by Henry II. about assizes.

We shall, lastly, speak of that which was called the *recognitio de nova disseisina* (a). When any one disseised another of his freehold unjustly, and without any judgment of law to authorise him, and the fact was within the king's assize; that is, if it was since the last voyage of the king to Normandy,<sup>1</sup> which was, it seems, the time limited for this purpose in the famous law so often alluded to; he might then avail himself of the benefit of that law, and have the following writ to the sheriff: *QUESTUS EST mihi N. quòd R. injustè et sine judicio disseisivit eum de libero tenemento suo in villâ, &c., post ultimam transfretationem meam in Normanniam: et ideo tibi præcipio, quòd si præfatus N. FECERIT TE SECURUM DE CLAMORE SUO PROSEQUENDO, tunc facias tenementum illud reseisiri de catallis quæ in eo capta fuerunt, et ipsum cum catallis esse facias in pace usque ad clausum Paschæ. Et interim facias duodecim liberos et legales homines de vicineto videre terram illam; et nomina eorum imbreviari facias. Et summane illos per bonos summonitores, quòd tunc sint coram me vel justitiis meis, parati inde facere recognitionem. ET PONE PER VADIUM ET SALVOS PLEGIOS PRÆDICTUM R. VEL BALLIVUM SUUM, SI IPSE NON FUERIT INVENTUS, quòd tunc sit ibi auditurus illam recognitionem, &c.*<sup>2</sup>

(a) As to the word *novel*, it applied when the action was brought since the last eyre or circuit. The term disseisin is very ancient in our law, and is used in the sense of wrongful seizure by force. Thus the terms are expounded in a chapter in the *Mirror* upon the subject (c. ii. 125): Disseisin, it is said, is a personal trespass in a wrongful putting out of possession, "and if I take from you forcibly anything of which you have had the peaceable possession, I do disseise you; and I do wrong to the king when I use force where I ought to use judgment." The wrong is here taken as well for deforcement or disturbance as for ejection. "Deforcement, as if one entereth into another's tenement when the rightful owner is elsewhere, and at his return cannot enter therein, but is kept out, and hindered so to do. Disturbance is if one disturb me wrongfully to use my seisin which I have peaceably had, and the same may be in three ways—1. As where one driveth away a distress, so that I cannot distrain in the tenement liable to my distress; 2. Another is where one doth replevy his distress wrongfully; 3. As if one distrain me so outrageously that I cannot mow, plough, or use my land duly." It is further said, "All right is of two kinds—either a right of possession or of property; and therefore the right of property is not determinable by this assize, as is the *known possession*, or that which savoureth of a possessory right. The remedy of disseisin holds not of invariables, nor of anything which falleth not into inheritance, as land, tenement, rent, advowson of a church, whether holden in fee or for term of life, or year, or mortgage, until so much be paid. *Ejection of a term of years falleth to the assize*, which sometimes cometh by lease, &c. Into this offence fall farmers (lessees) who lease their land for a longer time than their term endureth in prejudice of the lord or the reversioner" (*ibid.*)

<sup>1</sup> This was A.D. 1184, in the 30th year of Henry II.; so that the time of limitation, during that reign, was never more than about four years.

In the printed text of Glanville, there are these words between brackets: *Quod quandoque majus quandoque minus censetur*; which passage has been thought to import, that the time of limitation was often varied in this king's reign. Another meaning of this passage may be, that the period (the *terminus a quo*) being fixed, it must necessarily, by the lapse of time, be lengthening every day. After all, the passage lies under some suspicion of interpolation, and was, perhaps, for that reason put between brackets by the editor. This voyage into Normandy is referred to by later writers, as the limitation before the statute of Merton altered it.

<sup>2</sup> Glanv. lib. 13, c. 32, 33.



These writs of novel disseisin were of different forms, according to the nature of the freehold in whose prejudice the disseisin was made. There is one in Glanville for razing or prostrating a dyke *ad nocumentum liberi tenementi*; another for razing a mill-pool *ad nocumentum liberi tenementi*; another for a common of pasture appertaining *ad liberum tenementum*.<sup>1</sup> These are all the writs of novel disseisin mentioned in Glanville.

In this recognition no *essoïn* was allowed, but the recognition proceeded at the first day, whether the disseisor appeared or not—for here no delay was suffered either on account of minority, or a vouching to warranty; unless a person would in court first acknowledge the disseisin, and then he might vouch a warrantor, and the recognition would remain; the disseisor would be in the king's mercy—the warrantor was summoned, and the proceeding went on between him and the disseisor who vouched him. It must be observed that in this recognition whoever lost his suit, whether the demandant or tenant, or, as Glanville terms them (with a view perhaps to there being a sort of criminality<sup>2</sup> in a disseisin, the appellor and the appealed, he was in the king's mercy. If the appellor did not prosecute, by keeping the day appointed, his pledges also were in the king's mercy; and the like happened to the other party if he made default. The penalty ordained by the constitution which established this proceeding was only the *misericordia regis*, so often mentioned. It often happened in this recognition that the demandant, after he had proved the disseisin, wanted a writ to the sheriff to be put in possession of the produce and chattels upon the land, the form of which writ we have before shown.<sup>3</sup> It should be remarked that this writ to recover the chattels pursued the original writ of novel disseisin, which directed the party to be rescised of the chattels; in no other recognition was there any mention in the judgment *de fructibus et catallis*.<sup>4</sup>

Of terms and vacations. Having taken this view of the divers manners in which justice was obtained, it seems to follow that something should be said of the times which were allotted, at this early period, for the regular administration of it. The division of the year into term and vacation has been the joint work of the church and necessity. The cultivation of the earth, and the collection of its fruits, necessarily require a time of leisure from all attendance on civil affairs; and the laws of the church had, at various times, assigned certain seasons of the year to an observance of religious peace, during which all legal strife was strictly interdicted. What remained of the year not disposed of in this manner was allowed for the administration of justice. The Anglo-Saxons had been governed by these two reasons in distinguishing the periods of vacation and term; the latter they called *dies pacis regis*, the

<sup>1</sup> Glanv. lib. 13, c. 34-37.

<sup>2</sup> In the canon law, a forcible intrusion into an ecclesiastical benefice is construed *rapina*. Corv. Jus. Can. lib. 4, tit. 24.

<sup>3</sup> Glanv. lib. 13, c. 38, 39.

<sup>4</sup> *Ibid.* c. 38.

former, *dies pacis Dei et sanctæ ecclesiæ*.<sup>1</sup> The particular portions of time which the Saxons had allowed to these two seasons were adhered to by the Normans, together with other Saxon usages, and their term and vacation were as follow:—

It seems that *Hilary* term began *Octabis Epiphaniæ*—that is, the 13th of January, and ended on Saturday next before Septuagesima; which, being movable, made this term longer in some years than others. *Easter* term began *Octabis Paschæ* (nine days sooner than it now does), and ended before the vigil of Ascension (that is, six days sooner than it now does). *Trinity* term began *Octabis Pentecostes*; to which there does not seem to have been any precise conclusion fixed by the canon which governed all the rest; it was therefore called *terminus sine termino*; it seems to have been determined by nothing but the pressing calls of hay-time and harvest, and the declension of business very natural at that season. But the conclusion of it was fixed afterwards by parliament; by stat. 51 Hen. III. it was to end within two or three days after *quindena sancti Johannis*—that is, about the 12th of July. In later times, by stat. 32 Hen. VIII. Trinity term was to begin *Crastino sanctæ Trinitatis*. *Michaelmas* term began on Tuesday next after St Michael, and was closed by Advent; but as Advent-Sunday is movable, and may fall upon any day between the 26th of November and 4th of December, therefore the 28th of November, as a middle period, by reason of the feast and eve of St Andrew, was appointed for it. Thus were the terms in the latter part of the Saxon times, and during this period, almost in the same state we have them now; and by them the return of writs and appearances were governed.<sup>2</sup>

Having gone through the law of private rights, and the several remedies furnished for the recovery and protection of property, it remains to say something of the criminal law as it stood at the latter end of the reign of Henry II.; but, previous to this it may be proper to take a view of some few regulations that had been made on the subject of crimes and punishments antecedent to the time of which we are now writing. We have seen that a law was made by William the Conqueror, which took away all capital punishments, and, instead thereof, directed various kinds of mutilation. This law was repealed in one instance, A.D. 1108, in the 9th year of Henry I., when it was enacted, that any one taken *in furto vel latrocinio* should be hanged, without allowing any pecuniary *were* to be paid as a redemption<sup>3</sup> (a). The law of William, however, still operated in other cases; the punishment of crimes consisted in

(a) This is a mistake. The law was, that among the offences which put a man in *miseriordia regis*, was theft if worthy of death, "*Furtum probatum et morte dignum*" (*Leges Henrici Primi*, c. xlii.) But, in the same chapter, even homicide is allowed its compensation.

<sup>1</sup> Leg. Confes. c. 9.

<sup>2</sup> Wilk. Leg. Ang. Sax. p. 304.

<sup>3</sup> Spelman, Orig. of Terms.

mutilations of various kinds ; and it will presently be seen that this law of Henry I. was dispensed with or repealed.

Some provisions respecting the administration of criminal justice had been made by the statutes of Clarendon that were published at Northampton. It was thereby directed, that any one charged before the king's justices with the crime of murder, theft, robbery, or receipt of such offenders, of forgery, or of malicious burning, by the oaths of twelve knights of the hundred ; if there were no knights, by the oaths of twelve free and lawful men, and by the oaths of four out of every vill in the hundred ; that any one so charged should submit to the water ordeal, and if he failed in the experiment he should lose one foot ; and afterwards at Northampton it was added, in order to make the punishment more severe, that he should lose his right hand as well as one of his feet ; and also that he should

Of abjuration. abjure the realm, and leave it within forty days ; and even if he was acquitted by the water ordeal, that he should find pledges to answer for him, and then he might remain in the realm unless he was charged with a murder or some other heinous felony by the commonalty and lawful knights of the country. If he was charged with any of those crimes, notwithstanding his acquittal by the ordeal, he was to leave the kingdom within forty days, and carry all his goods with him (with a saving of all claims his lord might have on them), and so abjure the realm and be at the king's mercy as to any permission to return. This regulation was to be in force *so long as the king pleased*, in all cases of murder, treason, and malicious burning ; and in all the before-mentioned crimes, except in *small* thefts and robberies committed during the war (which was just concluded), in taking horses, oxen, and the like.

Thus an offender was subjected to a trial, by which, if convicted, he was to lose a limb and be banished ; if acquitted, he was likewise to be banished. Such a method of proceeding can be imputed to nothing but some doubt entertained of the justness of this trial by ordeal. It is related that, before this, William Rufus having caused fifty Englishmen of good quality and fortune to be tried by the hot iron, they escaped unhurt and were of course acquitted ; upon which that monarch declared he would try them again by the judgment of his court, and would not abide by this pretended judgment of God, *which was made favourable or unfavourable at any man's pleasure*. The king looked upon this trial to be fraudulently managed, as no doubt it was ; and Henry II., convinced of the fraud, would not allow such an acquittal to have its full effect ;<sup>1</sup> though it is a strong mark of the barbarism and prejudices of these times, that a practice liable to such suspicions was still suffered to continue as a judicial proceeding, and that they would rather punish those who were lawfully acquitted by it than altogether abandon such an abominable proceeding.

<sup>1</sup> Litt. Hen. II. vol. iv. 279.

Another provision made by the statute of Northampton related to the old law concerning decennaries. It declared that no one in a borough or vill should entertain any strange guest in his house more than one night unless he would engage to answer for his appearance; or such guest had some reasonable excuse for staying, which his host was to make known to the vicinage; and when he went away, it was to be by day and in the presence of the vicinage. Another ordinance was to secure the punishment of criminals who had been prosecuted and appealed before the inferior magistrates in order to a final trial before the king's justices; it declares, that any one taken for murder, theft, robbery, or forgery, and confessing himself guilty before the chief officer of the hundred or borough, or before certain lawful men, should not be permitted to deny the fact when brought before the justices.<sup>1</sup>

Such is the substance of certain statutes made for the improvement of criminal proceedings, in this and the preceding reigns. We shall now speak of the penal law in general, and the way of prosecuting offenders, as practised towards the end of the reign of Henry II. But in this we shall confine our inquiries to such objects as relate to the *curia regis* only; contenting ourselves with subjoining a short account of the proceedings before justices itinerant.

When a person was *infamatus*, as Glanville terms it, or accused of the death of a man, or of any sedition moved in the realm or army, it was either upon the charge of a certain accuser or not. If no certain accuser appeared, but he was accused only by the voice of public fame, or, as Glanville says, *fama tantummodo publica accusat* (which signified probably nothing more than what the statute of Northampton calls *per sacramentum legalium hominum*), he was immediately to be safely attached, either by proper pledges, or by a much safer security, that is, *per carceris inclusionem*. Then the truth of the matter was inquired before the justices, by many and various inquiries and interrogations; every probability was to be weighed, and every conjecture to be attempted, from facts and circumstances, which could be thought to make either on one side or the other. In conclusion, the criminal was either to be entirely acquitted, upon such inquiry, or was to be put to purge himself *per legem apparentem*; that is, by a number of compurgators. If upon this trial *per legem* he was convicted, his life and members depended upon the judgment of the court, and the grace of the king, as in cases of *felony*; for so Glanville calls this offence of *seditio regni vel exercitus*.<sup>2</sup>

If a certain accuser, or, as he is sometimes called by Glanville, and was afterwards more commonly called, an *appellor*, appeared at first, he was to be attached by pledges, if he could find any, for prosecuting the suit; if he could not find pledges, he was trusted

<sup>1</sup> Wilk. Leg. Ang. Sax. p. 330.

<sup>2</sup> Glanv. lib. 14, c. 1.

upon his solemn promise and engagement to prosecute; and this was the more common security for prosecuting felonies; lest binding by too severe an obligation might deter persons from assisting in bringing offenders to justice.

When the accuser had given security for prosecuting, then the person accused, as in the former case, used to be attached by safe pledges; and if he had none, was committed to prison: and it was a rule, that in all pleas of felony, except homicide, the accused person was to be discharged upon giving pledges.

Then a day was appointed, upon which the parties might have their lawful essoins. At length the accuser would propose what charge he had to make. He might perhaps say, that he saw, or would by some other means prove, the accused to have attempted or done something against the king's life, or towards moving sedition in the realm or army; or to have consented, or given aid, or counsel, or lent his authority towards such an attempt; and add that he was ready *dirationare*, to deraign or prove it, as the court should award: and if to this the person accused opposed a flat denial, then the whole was decided by the duel. When the duel was once waged in suits of this sort, neither party could decline or go back, under pain of being esteemed *pro victo*, and suffering all the consequences attending such a defeat; nor could they be reconciled, or the question between them be compromised, any otherwise than by the licence of the king or his justices.

If the parties at length engaged in the duel, and the appellor was vanquished, he was to be *in misericordia regis*; in addition to which he incurred perpetual infamy, and certain disabilities which always attended the being vanquished in a judicial duel. If the party accused was vanquished, he suffered the judgment of life and limb above-mentioned; and besides that, all his property and chattels were confiscated, and his heirs were disinherited for ever. A remarkable difference is here to be observed between a conviction *per legem apparentem*, and by duel: on the former, which was a remnant of the old Saxon jurisprudence, a felon suffered only the pains of death; but if convicted on the latter, which was a mode of trial introduced by the Normans, he suffered the additional penalty of forfeiture.

Every freeman, being of full age, might be admitted to this sort of accusation, or appeal; yet should a person within age appeal any one, he was nevertheless to be attached in the manner just mentioned. A rustic (by which it may be supposed that Glanville means a person not free) might bring such an appeal; but a woman was not admitted to prosecute an appeal of felony, except in some particular cases, which will be hereafter mentioned. The party accused might decline the duel, in suits of this sort, on account of his age; or some mayhem received; that is, if he was sixty years of age, or if he had broke a bone, or had suffered in his head, either *per incisionem*, or *per abrasionem*; for such only were

considered as mayhems. And in these cases, the party accused was to purge himself *per Dei judicium*; that is, by the hot iron, or by water according to his condition; if he was *homo liber*, a free man, by the former; if a rustic, or not free, by the latter.<sup>1</sup>

A suit for the fraudulent concealment of treasure-trove was carried on as above stated, where there appeared a certain accuser. But, upon a charge of this crime, like that above called *publica fama*, the law did not permit that any one should be put to purge himself *per legem apparentem*, unless he had been before convicted, or had confessed in court that he had found and taken some sort of metal in the place in question; and if he had been convicted thereof, the presumption then was so much against him, that he was obliged to purge himself *per legem apparentem*, and show that he had not found or taken any more. It should seem, from Glanville, that a particular law had been made to authorise the court to compel such a purgation, even where there was not the presumption before mentioned.<sup>2</sup>

When any one was accused of homicide, it might be in the two ways stated, and the proceeding in either was as has been just seen. Only it should be observed, that the accused was never discharged upon giving pledges, unless, says Glanville, by the interposition of the king's particular prerogative and pleasure; by which it has been generally thought,<sup>3</sup> that Glanville alludes to the writ *de odio et atia*; of which writ, however, we forbear to speak particularly, till we arrive at a period when we are certain that it was in use.

There were two kinds of homicide: one that was called *murdrum*; which, in the words of Glanville, was *quod nullo vidente, nullo sciente, clam perpetratur, præter solum interfectorem, et ejus complices; ita quod mox non assequatur clamor popularis, juxta assisam super hoc proditam*; such a secret killing, without the knowledge of any but the offenders, as prevented a hue and cry, ordained by statute to be made after malefactors. In an accusation or appeal for this crime of murder, none was admitted to prosecute except one who was of the blood of the deceased; and a nearer relation might exclude a remoter from deraigning the appeal. The other kind was that which was called *simple homicide*. In this crime also no one was admitted to become appellor, and make proof, unless he was allied to the deceased by blood, or by homage, or by dominion, and could speak of the death upon the testimony of his own eyes. Thus we see the qualification of the person to become appellor in simple homicide, extended further than in cases of murder; though it was required of him in this case that he should have been an eye-witness, which could not be in the former, from the very description of the crime, *nullo vidente*; and therefore the zeal and piety of the relation who charged a man with crime, seems to have been taken instead of

<sup>1</sup> Glanv. lib. 14, c. 1.<sup>2</sup> *Ibid.* c. 2.<sup>3</sup> 2 Inst. 42.

proof. Again, in this suit a woman might be heard as accuser, if it was for the death of her husband, and she could speak of what she herself saw. It will be shown presently, that a woman might bring an appeal of an injury done to her own person, and, according to Glanville, it was only upon the consideration of man and wife being *one* flesh, that she was allowed this appeal of the death of her husband. In these cases, the person accused might choose either to let it rest upon the proof made by the woman, or purge himself from the imputed crime *per Dei judicium*. Sometimes a person charged<sup>1</sup> with simple homicide, if he had been taken in flight, with a crowd pursuing him, and this was legally proved in court by a jury of the country, was obliged to undergo the legal purgation, without any other evidence being brought against him.<sup>2</sup>

The *crimen incendii*, or burning, was prosecuted and tried in the same way, as was also the *crimen roberie*, or robbery.<sup>3</sup>

The *crimen raptus*, says Glanville, was, when a woman declared herself to have suffered violence from a man in the king's peace, by which latter circumstance nothing more was meant than that the offence was such as was cognisable in the king's court only. The law directed that when a woman had sustained an injury of this kind, she should go, while the fact was recent, to the next village, and there *injuriam sibi illatam probis hominibus ostendere, et sanguinem, si quis fuerit effusus, et vestium scissiones*; she was to do the same to the chief officer of the hundred, and, lastly, was to make a public declaration of it in the first county court; after which she was to institute her plaint, which was proceeded in as in other cases; a woman being suffered to prosecute her appeal in this, as in all other instances of an injury done to her person. It should be remembered, as we before said, that it was in the election of the person accused, either to submit to the burthen of making purgation, or leave it upon the evidence of the woman herself. The judgment, in this crime, was the same as in those before mentioned. It was not enough for the offender, after judgment passed, to offer marriage, for in that manner, says Glanville, men of a servile or inferior condition would be enabled to bring disgrace upon women of rank, not for once, but for ever; and, on the other hand, men of rank might bring scandal on their parents and relations by unworthy marriages. We are informed, however, by the same authority, that it was customary, before judgment passed, for the woman and the man to compromise the appeal, and marry, provided they had the countenance of the king's licence, or that of his justices, and the assent of parents.<sup>4</sup>

The *crimen falsi*, in a general and large sense, contained in it many species of that crime: the making of false charters, false measures, false money, and other falsifications; the manner of prosecuting which appeals was the same as those we have just men-

<sup>1</sup> The expression in Glanville which is here construed *charged* is *restatus*.

<sup>2</sup> Glanv. lib. 14, c. 3.

<sup>3</sup> *Ibid.* c. 4, 5.

<sup>4</sup> *Ibid.* c. 6.

tioned. A distinction, however, was observed between forging royal and private charters: if the former, the party was sentenced as in case of læse majesty: if the latter, the offender was dealt more tenderly with, as in other cases of smaller forgeries, which were punished only by the loss of limbs.<sup>1</sup>

Of the *crimen furti*, or theft, and other pleas which belonged to the sheriff's jurisdiction, Glanville gives no account, as they did not come within the design of his work, which was confined to the *curia regis* (a). The prosecution of them was ordered differently, according to the usage and practice of different counties.<sup>2</sup>

Thus stood the law of crimes, and the method of proceeding, as far as related to the superior court. What was the office of the justices itinerant in the reign of Henry II., before justices we have before stated from the statute of Northampton, <sup>Proceedings before justices itinerant.</sup> when this establishment was revived. The jurisdiction of these justices was considerably increased soon after, as may be collected from certain *capitula*, or articles of inquiry, which were delivered to the justices itinerant in the year 1194, which was the fifth year of Richard I. According to those directions, they were to begin by causing four knights to be chosen out of the whole county, who, upon their oaths, were to elect two lawful knights of every hundred or wapentake; and those two were to chose, upon their oaths, ten knights in every hundred or wapentake; and if there were not knights enough, then free and lawful men. These twelve together were to answer to all the *capitula* which concerned that hundred or wapentake:

When that was done, the justices were to inquire of and determine both *new* and *old* pleas of the crown, and all such as were not determined before the king's justices; also all *recognitions*, and all pleas which were summoned before the justices by the king's writ, or that of his chief-justice, or such as were sent to them from the king's chief court. They were to inquire of escheats, presentations to churches, wardships, and marriages, belonging to the king. They were to inquire of malefactors, and their receivers and encouragers; of forgers of charters and writings; of the goods of usurers; of great assizes concerning land worth 100 shillings a year, and under; and of defaults of appearance in court.

They were to chose, or cause to be chosen, three knights and one clerk in every county, who were to be *custodes placitorum corone*; the same, probably, who were afterwards called *coronatores*, but

(a) Yet he regards it as a plea of the crown, for he brings it in under that head, and it clearly was so, being so declared in the laws of Henry I. (c. xiii), "*Quæ placita mittunt homines in misericordia regis*;" among which is "*furtum probatum et morte dignum*," &c., c. xlvii.: "*De causis criminalibus*," which begins "*de furto*." Our author imagined that because triable by the sheriff, it was not a plea of the crown; but that was a mistake, for the sheriff was the king's judge, whilst by Magna Charta it was declared that pleas of the crown should not be tried before him, which of itself implied that theft was so, as it was the only felony he tried.

<sup>1</sup> Glanv. lib. 14, c. 8,

*Ibid.*



they are not mentioned by that name in this reign. They were to see that all cities, boroughs, and the king's demesnes, were taxed. They were to inquire of certain rents in every manor of the king's demesnes, and the value of everything on those manors, and how many carucates or ploughlands they contained. They were also to swear good and lawful men, who were to choose others in different parts of the county, to be sworn to see the king's escheats and wardlands, as they fell in, well stocked with all necessities. Besides these, there were several articles relating to the Jews, which were occasioned by the outrages that had lately been committed by the populace against that people; as also concerning the lands and goods of John, earl of Morton, who had incurred great forfeitures to the king.<sup>1</sup>

In the year 1198, being the tenth year of this king, the justices itinerant had certain *capitula* delivered in charge to them, somewhat different from the preceding. As a view of such articles is the only means of gaining a true idea of the commission and office of these justices, it will be proper just to mention its contents. They were directed to hear and determine all pleas of the crown, both new and old, which had not been determined before the king's justices; and all assizes *de morte antecessoris*, *de novi disseisinâ*, and *de magnis assisis* concerning lands of £10 by the year and under; and of advowsons of churches. They were to inquire of vacant churches, wards, escheats, and marriages, as in the former *capitula*; of usury; of those *in misericordiâ regis*; of purprestures; of treasure-trove; of malefactors and their receivers; of fugitives; of weights and measures, according to the late assize made thereon the preceding year; of customs received by officers of seaports; lastly, of those who ought to appear at the *iter*, but neglected their duty.<sup>2</sup>

This same year, and before the *itineria* of the justices were over, the king appointed his justices of the forest to hold an *iter*, which was as solemn a proceeding as the other, but carried with it more terror, and a degree of oppression, on account of the grievous nature of the institution of forests in all its parts. These justices were commanded to summon, in every county through which they went, all archbishops, bishops, earls, barons, and all free tenants, with the chief officer and four men of every town, to appear before them *ad placita forestæ*, and hear the king's commands.<sup>3</sup>

It does not come within the scope of this history to enter minutely into a detail of the constitution and political events in the government of this and the succeeding times. A history, however, of our jurisprudence would be imper-

<sup>1</sup> Wilk. Leg. Ang.-Sax. p. 46, et seq.

<sup>2</sup> *Ibid.* p. 350.

<sup>3</sup> *Ibid.* For the assize of the forest, and the articles of inquiry before the justices, see Wilk. Leg. Ang.-Sax. p. 351.

fect without giving some small consideration to this subject, so far, at least, as it is connected with the formation and administration of our laws.

In the first ages of civil society, while laws are few, and the execution of them feeble, much must be left to the authority of the sovereign power. As the experience of later times points out the deficiencies of former laws, and particular remedies are applied, the exercise of this sovereign power seems so far to be abridged. The prerogative of the prince, and the dominion of the laws, in this manner occasionally take the place of each other; upon the increase of the latter, the former gives way and retires, collecting all its powers for the sole purpose of aiding and enforcing a due observance of the established law.

The just and requisite prerogative of the crown was perhaps very extensive in the Saxon times; but after the Conquest there concurred a number of circumstances, all tending to increase the power of the sovereign beyond the mere exigencies of orderly government.

The revolution effected by William did, in its consequences, render that prince powerful beyond all the sovereigns of his time, and all that have reigned since in this kingdom; for it threw the greatest part of the nation into a state of dependence on him for their lives and estates. The novelty of his reign, and the peculiar situation in which the prince stood, drove him upon every exertion of which his authority was capable; and, notwithstanding he confirmed to the nation the enjoyment of all their customs and laws, he made those laws themselves occasionally submit to the control of his power, whenever the necessities of his government demanded it. So much was the whole kingdom awed by his greatness, that no infringement of their laws was resented by the people during his reign.

What had been by force acquired to the Conqueror, continued in his successor through the same force, or the prevalence of an established government; and though some concessions were reluctantly made by subsequent monarchs, as will be seen hereafter, and the high claims of the crown were, in some degree, relaxed in favour of the people, they had no lasting effect: the exercise of an extensive prerogative continued in the crown through all these reigns, and rendered the condition of the subject extremely precarious and miserable.

The crown was assisted in the exercise of this prerogative by the manner in which the Norman law was introduced. The English, who had seen the laws of their Anglo-Saxon ancestors confirmed, had the fullest confidence that they should be governed by them in all questions concerning their persons and property. In the meantime, the Normans, who had taken sole possession of the king's court, had the debate and determination of all questions there agitated; and, continually recurring to the notions and principles of law in which they had been bred, determined conformably with

that law most points of doubt and difficulty. Thus the English, while they possessed the letter of their law inviolate, saw all their old customs explained away, or so cramped and modified as to amount almost to an abrogation of them.

In this conflict between the Norman and English laws, the prerogative of the king must necessarily have found occasions of enlarging its pretensions. While the rules of property and methods of proceeding were yet fluctuating and unsettled, every chasm was supplied, and every impediment removed, by the great power of the crown; the only subsisting authority which could reconcile the two contending politics. While the rights of persons and of property were not precisely defined, and it was not unanimously agreed by what set of rules and principles they were to be judged, the crown took every advantage, and interfered and dictated absolutely in most judicial inquiries.

It was during this precarious state of our laws that the people were constrained to purchase the favour of the crown, in order to obtain justice in the king's courts.<sup>1</sup> Fines were paid for the express purpose of having justice and right. Presents of a considerable value were made by suitors to obtain the opinion of the king's justices in a cause depending; for writs, pleas, trials, judgments. Sometimes part of the debt in contest was proffered to the crown for a favourable decision. Thus was the common course of justice made liable to the interference and control of royal authority.

This is only one instance, among many others, of the scope given to the exercise of supreme authority, while the state of our law was so unsettled, and its efforts so feeble. Besides the uncertain condition of our legal polity, other causes, rooted in the constitution of the government, contributed to arm the king with extraordinary powers. The strict feudal submission of a vassal to his liege lord encouraged the notion of an entire obedience in all things to the king, who, being supreme over all the lords in his kingdom, was, of course, to surpass them in the petty prerogatives which they themselves claimed within their own demesnes. These various causes concurring with the immense authority possessed by the first Norman king, enabled this race of monarchs to assume prerogatives, and exercise acts of sovereignty, to the last degree oppressive and tyrannical.

Besides the exertions of prerogative, the law itself, which had been framed under so baneful an influence, was arbitrary and cruel. *Tenures* and the *forest laws* were the source of endless jealousies and discontents, and occasioned most of the public disorders, which broke out with such violence in these times. The forest laws were first introduced by the Conqueror, to protect his favourite diversion of hunting. It was not sufficient that this mighty hunter assigned certain tracts of land, the property of his subjects, to be converted into forest; that he dispeopled and made desolate whole districts

<sup>1</sup> Madox. Exchequer, 293.

of cultivated country ; but, to secure the full enjoyment of it, he caused regulations to be framed, calculated to restrain and punish with severity every minute invasion of this new institution. The œconomy of the forest occasioned a number of grievous penalties : offences respecting vert and venison were punished with barbarous mutilations ; and other delinquencies with fine and imprisonment. A regular series of courts was erected to be held at stated periods, in one of which the judges obtained the distinguished style of *Justices in Eyre*.

The fruits and consequences of the feudal constitution made another, and no small part of the grievances then complained of, and were borne with great impatience by both peoples. The English, who had voluntarily consented to the introduction of tenures, principally as a fiction affording a basis for a national militia, ill-endured the oppressive conclusions drawn from that establishment ; conclusions which, with respect to them, had no foundation in reason or truth. Possessed of their land long before William entered the country, they revolted with indignation at the obligations by which they were now said to be bound to their lords. Feeling the burthens of this new state, they sighed after that freedom which they had enjoyed under their Saxon kings ; and, in their discourses with the Normans, instilled into them a persuasion, that other conditions of society, and other institutions than those which they laboured under, would consist with a well-ordered government. Nor were the Normans themselves satisfied with the increasing burthens of their own polity, which had accumulated much beyond their original design in establishing it. It was little recompense to a great lord, that he could exercise the like sovereignty over his tenants which he himself suffered from the king ; while the rear vassals, who were mostly English, without any power to compensate themselves, were in a state of society truly deplorable. These considerations united the nation in a common cause. The cry was for a restoration of the laws of Edward the Confessor, as a concise way of repealing all the late innovations.

But the abolition of a system to which the kingdom had conformed for some years could hardly be obtained ; to procure some alterations that would temper and abate the extreme evils complained of was as much as could be expected. This was done by *charters* granted by several of our kings. The charters.

Henry I. being possessed of the throne by a precarious title, endeavoured to conciliate the people by concessions of this kind. A formal charter was signed by the king. In this he abrogated, in general words, all abuses that had lately crept in ; and declared that no reliefs should be taken but such as were just and lawful. He disclaimed any right to exact money from his barons for licence to marry their daughters, or other females ; and engaged to give all female wards in marriage by the advice of his barons. The dower of widows was secured ; and the king engaged not to give

them in marriage without their consent. The widow or some other relation was to have the custody of the lands and persons of their children. All barons were enjoined to act in the like manner towards their vassals.

Having made these, with other ordinances relating to crimes and punishments, he expressly confirmed the laws of Edward the Confessor, *cum illis emendationibus quibus pater meus eas emendavit concilio baronum suorum*.<sup>1</sup> Thus were some branches of the feudal law, in a degree, checked in their growth, while the body remained firmly rooted and flourishing.

This charter was confirmed by Stephen,<sup>2</sup> who granted another, merely to secure the liberties of churchmen; to which order he had been mostly indebted for the possession of the crown.<sup>3</sup> The charter of Henry I. was also confirmed by Henry II.<sup>4</sup>

This charter, however, did not reach all the mischiefs that prevailed in the kingdom; nor were the provisions which it did contain faithfully observed (*a*). They, with all the rights of the people, were trampled on by succeeding monarchs. The unstable nature of government in these times made the condition of the people depend very much on the character of their kings; a circumstance which was happily experienced in the reign of John. With all that violence which hurried him on to sport with the liberties of a people, this prince wanted the firmness necessary to command respect and obedience; and while he excited their resentment by a wantonness of tyranny, he encouraged their resistance by his pusillanimity. Exasperated at repeated insults, his barons assembled, and with arms in their hands demanded of him a charter which might secure their property and persons from future invasions of power. A convention was soon held between the king and his people in an open field, called Runnymede, near Staines, in all the terrors of martial preparation. The king encamped, with some few adherents, on one side; the barons on the other. After some days of debate and consideration, the barons drew up a set of *capitula*, containing the heads of grievances, grounded upon the charter of Henry I. These, with some small qualifications to which they acceded, were then thrown into the form of a charter; to which the king affixed his seal.

(*a*) The language of the charter of Henry I. was general, and that of Henry II., confirming it, was still more so. And contemporary history amply attests what the statement of Sir J. Mackintosh hints, that John so abused the facilities of oppression which belonged to his paramount seignory, with reference especially to the female wards. It is stated by a contemporary chronicler, and there is no reason to doubt it, that the primate discovered a copy of The Charter of Henry I., and made it the basis of the new one extorted from John. The chief object of the barons, no doubt, was their own protection; and Dr Henry says, in his *History of Great Britain*, "though the great barons were very desirous to prevent the tyrannical exercise of the feudal authority towards themselves, many of them were much inclined to exercise it in the same manner towards their vassals, and continued to do so after the charter (B. 3, c. 3.) See Sir W. Blackstone's work on the Charters.

<sup>1</sup> Blac. Tracts, vol. ii. p. 8.

<sup>2</sup> *Ibid.* p. 9.

<sup>3</sup> *Ibid.* p. 10.

<sup>4</sup> *Ibid.* p. 11.

This charter of king John, usually called *Magna Charta*, and the *Charter of Liberties*, is more full and explicit than that of Henry I. (a) In this, reliefs were fixed at a certain sum; many

(a) This charter forms an important step or stage in our legal history, and some account of it here will be convenient. As already mentioned, the feudal system had been grossly abused by the king, as it had been by his predecessors. The charter of Henry I. had chiefly been directed against these abuses, and the first articles drawn up for the present charter were founded upon it, and had reference to these abuses. Thus came an article that the king nor his bailiffs shall not seize upon any land for debt, while there are sufficient goods of his debtors; nor shall the securities of a debtor be distressed so long as the principal debtor is solvent; but, if the principal debtor fail in payment, the securities, if they are willing, shall have the lands of the debtor until they shall be repaid, unless the principal debtor shall show himself to be acquitted thereof from the sureties. Then came the article that common pleas shall not follow the court of our lord the king, but shall be assigned to any certain place, and that recognition be taken in the several counties in this manner; that the king shall send two justiciaries four times in the year, who, with four knights of the same county, elected by the people thereof, shall hold assizes of novel disseisin, mort d'ancestor, and last presentation, nor shall any be summoned for this unless they be jurors, or of the two parties (9). That a freeman shall be amerced for a small fault, according to the degree of the fault, and for a greater crime, according to its magnitude, saving to him his contentment. A villein also shall be amerced in the same manner, saving his wainage, and a merchant in the same manner, saving his merchandise, by the oath of faithful men of the neighbourhood (10). That a clerk shall be fined according to his lay fee in the manner aforesaid, and not according to his ecclesiastical benefice (11). That no town shall be amerced for the making of bridges for rivers' banks, unless they shall of right have been anciently accustomed to do so (12). That the assizes of novel disseisin and mort d'ancestor be shortened, and made like to other assizes (14). That no sheriff shall of himself enter into pleas belonging to the crown without the crown's authority; and that counties and hundreds shall be at the ancient farm, without increase, unless they be of the manors of our lord the king (15). If any who hold of the king shall die, although a sheriff or other officer of the king shall seize and register his goods by the view of lawful men, yet nothing shall be removed until it be fully known if he owe anything, and his debts to our lord the king shall be paid; then, when the whole of the king's debts are paid, the remainder shall be given up to the executors, to do according to the will of the deceased, and, if he should not owe anything to the king, all the goods of the deceased shall be restored. If any freeman die intestate, his goods shall be distributed by his nearest of kindred and his friends, and by the view of the church. No constable or other officer shall take corn or other goods, unless he shall presently render payment, or unless he shall have respite by the will of the seller. No constable shall distrain any knight to give money for castle gard, if he be willing to keep it in his own person, or by any other true man, if he shall not be able to do so by any reasonable cause. No sheriff or bailiff of the king, nor any other, shall take horses or carts of any freeman for coinage, unless it be by his own free will. Neither the king nor his bailiffs shall take another man's timber for castles or for any other uses, unless it be by the will of him to whom the timber was belonging. That all weirs for the time to come shall be destroyed in the rivers of Thames and Medway, and throughout all England. Nothing shall be given for a writ of inquisition of life or limb, but it shall be granted freely without force and not denied. No freeman's body shall be taken or imprisoned, nor disseised, nor outlawed, nor banished, nor in any ways be damaged; nor shall the king send him to prison by force, except by the judgment of his peers, and by the law of the land. Right shall not be sold, delayed, nor denied. Merchants shall have safety to come and go, buy and sell, without any evil tolls, but by ancient and honest customs. No scutage or aid shall be imposed on the kingdom, except by the common council of the kingdom, unless it be to redeem the king's body, to make his eldest son a knight, or to marry his eldest daughter, and that it be a reasonable aid; and in like manner shall it be concerning the tallage and aids of the city of London and of other cities, which from this time shall have their liberties. That it shall be lawful for any one to go out of the kingdom and return again, saving his allegiance. That the king shall make justiciaries, sheriffs, and bailiffs, of such as know the law of the land, and are disposed duly to observe it.

regulations were made concerning wardship and marriage, the rights of persons, and the administration of justice; all which will be considered in the succeeding reign, when *Magna Charta* was confirmed, with some alterations, by Henry III.; this of Henry III. being the Great Charter, which is always referred to as the

Such were the principal articles proposed, from which may be gathered what were the principal grievances by which the country was oppressed. It may be observed, that as they were all as undoubtedly contrary to the law as it stood—but then it is to be added that much of it had not been declared. There was, however, another and a greater object to be attained even than the declaration of the law, and that was its sanction, protection, or execution. Charters had already been granted, which guaranteed many of the articles; but the guarantees had been found nugatory. And here was the main difficulty. Hence there was a concluding article, providing that by way of security, a certain number of the barons should be appointed, who should see to the observance of the charter by the king, and, if he violated it, and he or his justiciary did not amend it, that they might make war upon him. It is manifest that as the barons were to judge of the breach of the charter, the effect of this article would be nothing less than to transfer the supreme power to them. It would be a complete political revolution. As Guizot observes, it simply authorised civil war. And this was the only result: the king was compelled, indeed, to accede to it, but then he took the first opportunity to protect himself against the transfer of his power to the barons; and a civil war ensued, which lasted the rest of his reign, and broke out again in the next, causing a vast amount of misery. When the charter was drawn up, there were, however, some important variances and departures from the articles. The stipulation as to talliage was omitted, and it was provided that for a common council of the realm for the assessment of scutages and aids, the peers and prelates should be summoned together with all the chief tenants of the crown. The clause as to taking assizes in the counties was altered, and so drawn as to show, in a remarkable manner, the close connexion between the “assize,” or judicial circuits of the king’s judges, and the county courts which they superseded. After providing that justices should be sent into each county, to take the assizes, “if the assizes cannot be taken on the day of the county court, let as many knights and freeholders of those who were present at the county court remain behind as shall be sufficient to do justice.” So the article as to amercement of freemen was added: “and none of the amercement shall be assessed, but by the oaths of lawful men of the vicinage.” And an article was added, “carls and barons shall not be amerced but by their peers, and that only according to the degree of their delinquency.” To the article that no town shall be obliged to repair bridges, &c., unless by ancient prescription, was added “nor any person.” The article as to the criminal jurisdiction of the sheriff ran simply thus: “No sheriff, coroner, &c., shall hold pleas of our crown,” without any qualification. To the article as to wears, was added “except upon the sea-coast.” The important article as to personal liberty was altered so as to read thus: “No freeman shall be seized, &c., nor in any way destroyed, nor will we condemn him, nor commit him to prison, except by the legal judgment of his peers, or by the law of the land.” And the next was rendered more full and emphatic: “To none will we sell, to none will we deny; to none will we delay, right or justice.” Though the king was forced to sign, it only resulted in civil war; and, on the accession of Henry III., another was granted, which omitted the clauses as to scutages and the assessing of aids, the liberty of entering and leaving the kingdom, and some other articles. In the next year, another charter was granted, which contained some important variations. It was provided that a widow should have dower of the third part of her husband’s lands, except she were endowed with less. The assizes were to be taken only once a year, and there was this important provision: “And those things which, at the coming of the justiciaries being sent to take the assizes, cannot be determined, shall be ended in some other place in their circuit; and those things which, for the difficulty of some of the articles, cannot be determined by them, shall be determined by our justiciaries of the bench, and then shall be ended. No county court shall from henceforth be holden but from month to month; and, where a greater term hath been used it shall be greater. Neither shall any sheriff keep his turn in the hundred but twice in the year. Scutage shall be taken as in the time of Henry I. It shall not from henceforth be lawful for any one to give his lands to any religious house, and to take

basis of our law and constitution; while the charter of John is only remembered as a monument of antiquity (a). One very striking provision of John's charter, which is omitted in that of Henry III., deserves our notice. It is there declared that no scutage or aid shall be levied on the subject *nisi per commune concilium regni nostri*; except in the three cases in which a feudal lord was entitled to the assistance of his vassal; namely, on marriage of his daughter; on making his son a knight, and to redeem his person from captivity, a restriction that was declared by the charter to hold good, not only between the king and his tenants, but between every lord and his tenants. In order to assemble the *commune concilium regni* to assess such scutages and aids, the king engaged to summon all archbishops, bishops, abbots, earls, and greater barons *sigillatim per literas; et præterea*, says he, *faciemus summoneri in generali per vicecomites, et ballivos nostros, omnes illos qui de nobis tenent in capite*; a passage that seems, beyond all controversy, to point out the constituent members of the great council of the kingdom in those days.

Several originals of this charter were executed by the king. It is said that one was deposited in every county or at least in every diocese. In pursuance of one of the provisions in the charter, twenty-five barons were elected as guardians of the liberties of the people, who were to see the contents of it properly executed; but the troubles that soon followed, from the want of faith in the king, prevented this scheme of reformation. The king died in the next year, and left the kingdom in all the horrors of a civil war.

We shall now consider the kings whose reigns fall within this period, in their character as legislators. We have before seen, that William the Conqueror, besides confirming the laws of the Confessor, made some himself, which effected no inconsiderable alteration, by introducing tenures, and the trial by duel in criminal questions. Besides these express ordinances, he contrived all means of ingrafting the laws of Normandy upon the common law; for this purpose, he appointed all his judges from among his Norman subjects, and made that language be taught in schools.<sup>1</sup> By the constitution of his courts of justice, and every act of his administration, he did all in his power to change the jurisprudence of the country.

Characters of  
these kings as  
legislators.

the same land again to hold of the same house; nor shall it be lawful for any religious house to take the land of any, and to leave the same to him from whom they were received. Therefore, if any do give his land to any religious house, his gift shall be void, and the land shall accrue to the lord." Then there was a general saving to all persons, ecclesiastical or lay, the liberties and free customs they had formerly had.

(a) This is not quite so. On the contrary, as the charter of John was the original, it is of the greater importance in an historical point of view, and, at all events, it forms an important step or stage in our legal history; and the comparison of its terms with the articles and with subsequent charters, afford very interesting illustrations of the history of the subject, for which reason some account of them has been given.

<sup>1</sup> Wilk. Leg. Sax. p. 289.



We hear nothing of Rufus as a legislator; nor are there any laws of Henry I. except his charter (a); but there is every reason to believe that the latter of these princes paid great regard to the improvement of the law. He was himself a man of learning, and had a disposition to quiet the minds of his subjects by a good administration; the laws, therefore, which go under his name may be considered as a compilation, at least, made in his reign, and as an instance of his attention to the subject of legislation.

The reign of Stephen was a period of continual war and disturbance, and of course gave little room for improvement in legal establishments. The introduction, however, of the books of canon and civil law must have contributed to the great advances made in the time of his successor, Henry II.; for, though there was always an extreme jealousy in the practisers of the common law, with respect to those two systems, it went no further than to an exclusion of their authority as governing laws; they were still cultivated by them as branches of the same science, and had a great effect in polishing and improving our municipal customs.

The wise administration of Henry II. operating on the advantageous circumstances concurring in the latter end of his reign, when all things were reduced to peace, contributed more to advance our legal polity than all the preceding times from the Conquest put together. Without recapitulating what has been before related, let any one compare the work of Glanville with the laws (or, as it might more properly be called, *the treatise of law in the time*) of Henry I., the great regularity in the order of proceeding, and the refinement with which notions of property are treated, and he will see the superiority of the later reign in point of knowledge. It is probable, that the additions and amendments made in the law of this kingdom were by this prince transplanted into Normandy, and occasioned a still further improvement in the law of tenures; as lawyers were, by these communications, engaged in a kind of competition to enlarge and polish the same subject of inquiry. The whole of our municipal law was improved to a high degree during the reign of Henry II. and afforded an ample foundation for the superstructure raised on it in the time of Richard and John, and more particularly in the reign of Henry III.

It does not appear that Richard took any part himself in contributing to further the great designs of his father, in matters of municipal regulation, but left things to the course they had been put in by him. This prince, however, stands very high in the history of maritime jurisprudence. Upon his return from the Holy Land, while he was in the Island of Oleron, on the coast of France, he compiled a body of maritime law. This was designed

(a) This is not so. There are, as already mentioned in the *Leges Henrici Primi*, many which are of his reign, though the whole is a compilation, and some have also been already alluded to as scattered in the *Mirror of Justice*. The *Leges Henrici Primi*, however, is rather a treatise of the laws, than a mere collection of them.

for the keeping of order, and the determination of controversies abroad; and the wisdom with which it was framed, has been evinced by the general reception it has obtained in other nations.<sup>1</sup> King John did nothing memorable in the way of legislation in this kingdom; though he has the praise of having first introduced the English laws into Ireland,<sup>2</sup> where he instituted sheriffs and other officers to interpret and execute them. He likewise appointed a grand justiciary to preside over the administration of justice in that kingdom.<sup>3</sup>

The monuments which remain of the jurisprudence of these times are not very numerous. They consist of some laws, charters, records, and law treatises.

Of the laws of William the Conqueror, some are in Norman-French, and some in Latin. The first fifty *capitula* in Norman-French are what, Ingulphus says, he brought down to his abbey of Croyland, as those which the king had confirmed, and commanded to be observed throughout England.<sup>4</sup> Though the time when they were enacted is not mentioned, it is tolerably clear, that it was not long after Ingulphus went to London on the affairs of his monastery, in the sixteenth year of William's reign. These therefore were, probably, such alterations and additions as he chose to make in the laws of Edward, which had been allowed in the fourth year of his reign.<sup>5</sup> There follow some other laws of William in the form of a charter; and as the first mostly concern the criminal code, these latter constitute some alterations in the civil. These are in Latin, and go from the fifty-first chapter to the sixty-seventh inclusive. There are also some others in the form of a charter, which, together with the preceding, make in all eighty-one *capitula* of laws of William the Conqueror.

There are no laws remaining of William Rufus, if any were made; nor of Henry I. except his charter. Those that usually go under the title of laws of this king, and are entered in the Red Book of the exchequer, seem to have been reduced into that form by some person of learning, as containing a sketch of the common law then in use; a manner of entitling treatises not then uncommon: for there is now to be seen, in the Cottonian collection, a manuscript of Glanville which bears the title of *Laws of Henry II.*<sup>6</sup> There is no evidence that these laws were enacted by the great council, or granted by any charter. They contain ninety-four *capitula*, and are to be found in the collection of Lambard and Wilkins.

We have no remains of legislation in the time of Stephen. The laws of Henry II. are the Constitutions made at Clarendon, anno 1164, and the statutes made at Northampton, anno 1176. The first fourteen of the Constitutions of Clarendon made several alterations in the civil and criminal part of our laws; the remaining

<sup>1</sup> Black., vol. iv. p. 423.

<sup>2</sup> *Quære*, if not Henry II., vide Harris's *Hibernia*, part ii. p. 215, *et seq.*

<sup>3</sup> Tyrr. vol. ii. p. 809.

<sup>4</sup> Ingulph.

<sup>5</sup> Tyrr. vol. ii. p. 69.

<sup>6</sup> Claud. D. 2.

sixteen concern ecclesiastical affairs, and contain those points which were disputed between Henry and Becket, and between this kingdom and the see of Rome.

Besides laws, there remain some public acts of this reign; as *articles of inquiry concerning the extortion and abuses of sheriffs, and the assize of arms*. During the reigns of Richard and John, there are no laws which can be properly so called; but there are commissions and ordinances of a public nature respecting the administration of justice. In the reign of the former, there are some *articles of the crown, with the forms of proceeding in those pleas; and directions for preserving the laws of the forest*.<sup>1</sup>

Besides the laws of these kings which have been mentioned, there are many other provisions made in these reigns which may be found, arranged in the order of time in which they passed, in the *Codex Legum Veterum*, intended for publication by Spelman, and now annexed to the end of Wilkins' Anglo-Saxon Laws.<sup>2</sup>

The great monuments of this period are the *charters*. Under this title might indeed be reckoned those laws of William the Conqueror which we have just noticed to have passed in that form. But the charters, properly so called, and which have become so famous on account of the object they all had in view, namely, the removal and redress of certain grievances, are the following:—The charter of Henry I., containing eighteen chapters; that of Stephen, containing thirteen chapters; that of Henry II., containing only two chapters, and expressed in very general terms; the *Capitula Baronum*, being those heads of grievances which were proposed by the barons to John to be redressed; and the *Magna Charta* of that king, drawn up in pursuance of them; these are all to be found in the late Mr Justice Blackstone's correct edition of the charters,<sup>3</sup> where that great ornament of English law has given a critical and very curious history of these valuable remains of antiquity.

The laws, or *assise*, as they were called, made at this early period, deserve a little further consideration. It has been before observed, that our law is composed of the custom of the realm, or *leges non scriptæ*, and the statutes, or *leges scriptæ*. Our lawyers have made a distinction among statutes themselves; they have distinguished between statutes made before the time of memory, and those made since. The *time of memory* has been fixed in conformity with a provision made in the time of Edward I. for settling the limitation in a writ of right; which was, by stat. 1 West. c. 39, fixed at the beginning of the reign of Richard. Though the limitation in a writ of right has been since altered, this period has been chosen as a distance of very high antiquity, at which has been fixed *the time of memory*, as it is called; so that everything before that period is said to have happened before the time of memory.

<sup>1</sup> Tyr. vol. ii. p. 578.

<sup>3</sup> Black. Tracts, vol. ii.

<sup>2</sup> See the Preface to Wilk. Ang.-Saxon Laws.

Those statutes which were made before the time of memory, and have not since been repealed nor altered by contrary usage, or subsequent acts of parliament, are considered as a part of the *leges non scriptæ*; being, as it were, incorporated into, and become a part of, our common law: and notwithstanding copies of them may be found, their provisions obtain at this day, not as acts of parliament, but by immemorial usage and custom; of which kind is, no doubt, a great part of our common law.<sup>1</sup>

Laws were termed sometimes *assisæ*, sometimes *constitutiones*. Though the most solemn and usual way of ordaining laws was to get the concurrence of the *commune concilium regni*, it should seem that in these times the king took upon himself to do many legislative acts which, when conformable with the established order of things, were readily acquiesced in, and became the law of the land. The very frame, indeed, of such laws as were sanctioned with all possible formalities, carried in them the strongest appearance of regal acts: if a law passed *concilio baronum suorum*, it was still *rex constituit*.<sup>2</sup> Of the laws of William the Conqueror, though in some parts they seem to have the authority of the great council, *statuimus, volumus, præcipimus*; yet in others they speak in the person of the king only, *hoc quoque præcipio, et prohibeo*.<sup>3</sup> The form of a charter, in which the king is considered as a person granting, was a very common way of making laws at this time; and this carries in it the strongest proof of the sentiments entertained in those ages concerning legislation: nevertheless, it is to be remarked, that some of these charters, from the solemnities attending the execution of them, might be regarded as having all the validity of laws; as the charter of king John, to which the barons of the realm were parties. There were, however, several other charters which seem to have no authority but that of the sovereign. Indeed, several laws, or *assisæ*, even so low down as Henry II. and the reigns of Richard and John, vouch no other sanction but *rex constituit*, or *rex præcipit*, for everything they command or direct.

There is no way of accounting for this extraordinary appearance of the old statutes, but by supposing the state of our constitution and laws to have been this: That the judicature of the realm being in the hands, and under the guidance of the king and his justices, it remained with him to supply the defects that occasionally appeared in the course and order of proceeding; which, being founded originally on custom and usage, was, in its nature, more susceptible of modification than any positive institution, that could not be easily tampered with without a manifest discovery of the change. In an unlettered age, it was convenient and beneficial that the king should exercise such a superintendence over the laws as to declare, explain, and direct, what his justices should do in particular cases; such directions were very readily received as positive

<sup>1</sup> Hale *Hist.* 3, 4.

<sup>2</sup> *Vide Schmidt der Deutschen, Geschichte*, vol. i. 582.

<sup>3</sup> Wilk. 217, 218.

laws, always to be observed in future; and, no doubt, numbers of such regulations were made of which we have at present no traces. While this supreme authority was exercised only in furtherance of justice, by declaring the law, or even altering it, in instances which did not much intrench upon the interest of the great men of the kingdom, it was suffered to act at freedom. But no alteration in the law which affected the persons or property of the barons could be attempted with safety, without their concurrence in the making of it; as, indeed, it could not always be executed without the assistance of their support. Thus it happened that when any important change was meditated by the king, a *commune concilium* was summoned, where the advice of the *magnates* was taken; and then the law, if passed, was mentioned to be passed with their concurrence. On the other hand, had the nobles any point which they wanted to be authorised by the king's parliamentary concurrence, a *commune concilium* was called, if the king could be prevailed on to call one; and if the matter was put into a law, the king here was mentioned to have commanded it, at the prayer and request of his barons; so that, one way or other, the king is mentioned in all laws as the creative power which gives life and effect to the whole.

As laws made in the solemn form by a *commune concilium* were upon the points of great importance, and often the subjects of violent contest; they were in the nature of concords or compacts between the parties interested, and were sometimes passed and executed with the ceremonies suitable to such a transaction. The Constitutions of Clarendon (which too were called the ancient law of the kingdom, and therefore only to be declared and recognised as such) were passed in that way. Becket and all the bishops took an oath to observe those laws; and all, except Becket, signed, and put their seals to them. The laws were drawn in three parts. One counterpart, or authentic copy, was given to Becket, another was delivered to the archbishop of York, a third was retained by the king himself, to be enrolled among the royal charters.<sup>1</sup> The *Magna Charta* of king John was executed with similar solemnity, and bore a similar appearance of a compact between the king and his nobles. It was not uncommon that the people, as well as the makers, should be sworn to observe laws; the *assise statuta*, *et jurata*, are mentioned by Bracton as an article of inquiry before the justices in eyre in the reign of Henry III.

The *rotuli annales*, or *great rolls of the pipe*, in which the accounts of the revenue were stated, are the most ancient rolls now remaining, and the series of them is perfect from the first year of Henry II. Besides this there is still remaining in the same archives, a *great or pipe roll*, which has been supposed to belong to the *fifth year of king Stephen*, but has been proved by Mr Prynne and Mr Madox<sup>2</sup> to be entitled to an earlier date; indeed,

<sup>1</sup> Litt. Hen. II., vol. iv. p. 26.

<sup>2</sup> Mad. Hist. Dis. Epist.

to belong to some year of Henry I.; and, according to Mr Prynne, to the eighteenth of that king.

The plea rolls of the exchequer, now remaining, do not begin till the reign of Edward I. The oldest rules of the *curia regis* now extant begin with the first year of Richard I., as do the *assize rolls* of the justices itinerant. Those of the *bancum* begin with the first year of king John, which is very near the first establishment of that court. There are *charter rolls* of the chancery, of the first year of king John, and *close rolls*, *fine rolls*, *patent rolls*, *liberate rolls*, and *Norman rolls*, of the second, third, and sixth year of that king. All the before-mentioned rolls, except the *great rolls of the pipe*, are said to be now in the Tower of London, and are the earliest specimens of records that have been spared by the joint destruction of time, wilfulness, and neglect. The cruel havoc made by these enemies has occasionally excited a temporary attention to this important article, and measures have, in consequence, been pursued for preserving such muniments as remained. Such events, in the history of our records, will be mentioned in their proper places.<sup>1</sup>

Among the records and valuable remains of antiquity we must not forget the famous *Domesday Book*, which, though not strictly a monument of a legal nature, yet has this connexion with the history of our law, that it is said to have been made with a view to the establishment of tenures. This book contains an account of all the lands of England, except the four northern counties; and describes particularly the quantity and value of them, with the names of their possessors. King Alfred is said to have composed a book of this kind about the year 900, of which this was in some measure a copy. This work was begun in 1080, and completed in six years. It has always been esteemed of the highest authority, in questions of tenure; and is considered by antiquarians as the most ancient and most venerable record that now exists in this or any other kingdom. The *Black and Red Book of the Exchequer*<sup>2</sup> seem very little more connected with our ancient laws than the foregoing work, except that in both of them was found a transcript of a law treatise which will be mentioned presently.

<sup>1</sup> See Ayloffe's *Ancient Charters*, Intro.

<sup>2</sup> Domesday Book is a document belonging to the Receipt of the King's Exchequer, and is in the Chapter House at Westminster. It is in two volumes. For a more satisfactory account of this ancient record we must refer the reader to a small quarto pamphlet, entitled, "*A short Account of some Particulars concerning Domesday Book, with a View of its being published. By a Member of the Society of Antiquarians.*" This is a performance of Mr Webb, and was read at the society in the year 1755. In this little essay is brought together in one view all that had been said by former historians and antiquarians on the subject of Domesday.

By the munificence of parliament, *Domesday* has been printed; but we must regret that this laudable regard of the legislature towards our ancient records has not been seconded by the common attention which has been paid to every other publication since the earliest times of printing. The reader will be surprised when he is told that this book has no prefatory discourse, or index, not even a title-page, or the name of the printer: it is a mere *fac-simile*, constituting a very large folio, full of abbreviations and signs, that cannot be understood without a key, and much previous information.

There are two treatises written in the reign of Henry II. which contribute greatly to illustrate the state and history of our law : the one is the *Dialogus de Scaccario*<sup>1</sup> before alluded to ; the other is the *Tractatus de Legibus Angliæ*, by Glanville.

The *Dialogus de Scaccario* has generally passed as the work of Gervase of Tilbury ; but Mr Madox thinks it was written by Richard Fitz-Nigel, bishop of London, who succeeded his father in the office of treasurer in the reign of Richard I., and was therefore well qualified for such an undertaking. This book treats, in the way of dialogue, upon the whole establishment of the exchequer, as a court and an office of revenue ; giving an exact and satisfactory account of the officers and their duty, with all matters concerning that court, during its highest grandeur, in the reign of Henry II. This is done in a style somewhat superior to the law-latinity of those days.

Glanville's book is of a very different sort: this is written without any of the freedom or elegance discoverable in the other ; and has all the formality and air of a professional work. It is entitled, *Tractatus de Legibus et Consuetudinibus Regni Angliæ* ; but notwithstanding this general title, it is confined to such matters only as were the objects of jurisdiction in the *curia regis*. Having stated this as the limit of his plan, the author very rarely travels out of it. Glanville's treatise consists of fourteen books ; the first two of which treat of a writ of right, when commenced originally in the *curia regis*, and carry the reader through all the stages of it, from the summons to the appearance, counting, duel, or assize, judgment and execution. In the third, he speaks of vouching to warranty ; which, being added to the two former books, composes a very clear account of the proceeding in a writ of right for recovery of land. The fourth book is upon rights of advowson, and the legal remedies relating thereto. The fifth is upon actions to vindicate a man's freedom ; the sixth, upon dower. The seventh contains very little concerning actions ; but considers the subjects of alienation, descent, succession, and testaments. The eighth is upon final concords ; the ninth, upon homage, relief, and services ; the tenth, upon debts and matters of contract ; and the eleventh, upon attorneys. Having thus disposed of actions

<sup>1</sup> *Liber Ruber* and *Liber Niger Scaccarii* are two miscellaneuous collections of charters, treatises, conventions, the number of hides of land in several counties, escuage, and the like ; many of which, as well as the *Dialogus de Scaccario*, are to be found in both those books. The *Liber Niger* has been printed by Hearne, together with some other things, in two volumes 8vo ; of which the *Liber Niger* fills about 400 pages. He entitles it, "*Exemplar vetusti codicis MS. (nigro velamine cooperti) in Scaccario*," &c. The collector of the contents of the *Liber Ruber* is supposed by Mr Madox to have been Alexander de Swereford, archdeacon of Shrewsbury, and an officer in the Exchequer in the latter end of Henry II.

It seems as if the *Dialogus de Scaccario* had been considered as the whole of the *Liber Niger*, till the publication of Hearne ; and since Mr Madox has pronounced Richard Fitz-Nigel to be the author of the Dialogue, and not Gervase of Tilbury, the whole of the *Liber Niger* has been given to Gervase, though it does not appear for what reason. The *Dialogus de Scaccario* is published by Mr Madox, at the end of his *History of the Exchequer*. See Nicholson's *Eng. Hist.* p. 173 ; Hearne's *Liber Niger*, p. 17.

commenced originally in the *curia regis*, in his twelfth book he treats of writs of right brought in the lord's court, and the manner of removing them from thence to the county court and *curia regis*; which leads him to mention some other writs determinable before the sheriff. In his thirteenth book he speaks of assizes and dis-seins. The last book is wholly upon pleas of the crown.

The subject of this treatise is all along illustrated with the forms of writs; a species of learning which was then new; was probably brought into order and consistency by Glanville himself; and first exhibited in an intelligible way, and with system, in this book.

The method and style of this work seem very well adapted to the subject: the former opens the matter of it in a natural and perspicuous order; while the latter delivers it with sufficient simplicity and clearness. The latinity of it, however, may not satisfy every taste; the classic ear revolts at its ruggedness; and the cursory reader is perpetually impeded by a new and harsh phraseology. But the language was not adopted without design; the author's own account of it is this: *stylo vulgari, et verbis curialibus utens, ex industria, ad notitiam comparandam eis, qui hujusmodi vulgaritate minus sunt exercitati*.<sup>1</sup> The author seems not to be disappointed in his design even at this distance of time; for a person who reads the book through, cannot fail of finding in one place an explanation of some difficulty he may have met with in another: the recurrence of the same words and modes of speaking makes Glanville his own interpreter. When the style of Glanville is mastered in this way, it will appear that many obscure sentences have been rendered such through too great an anxiety to express the author's meaning; and perhaps it will not be an affectation of discernment to say, that the plain English which it is thus attempted to convey, may be seen through the awkward dress which this latinist has spread over it.

If Glanville confines himself to a part only of our law, he treats that part with such conciseness, and sometimes in so desultory a way, that his book is to be looked upon rather as a compendium than a finished tract; notwithstanding which, it must be considered as a venerable monument of the infant state of our laws; and as such, will always find reception with the juridical historian when thrown aside by the practising lawyer..

It has been a general persuasion that the writer of this book was *Ranulphus de Glanvillâ*, who was great justiciary to Henry II. This great officer, though at the head of the law, united in himself a political as well as a judicial character; and it seems that Glanville was likewise a military man, for he led the king's armies more than once, and was the commander who took the king of Scots prisoner. It might therefore be doubted whether a person of this description was likely to be the author of a law-treatise containing a detail of the practice of courts in conducting suits. There was a

<sup>1</sup> Prolog. ad finem.



*Ranulphus de Glanvillâ* who was a justice itinerant,<sup>1</sup> and who, it is said, was a justice in the king's court towards the close of this reign. If the author was really of this name, it may be doubted whether he was not the latter of these two persons. Perhaps, after all, this work might be written by neither, but may be ascribed to the great justiciary for no other reason than because he presided over the law at the time it was written, and might be the promoter of the work, and patron to its author. Whatever doubt there may be concerning the author, there is no question but it was written in the reign of Henry II.—there are many internal marks to prove it to be of that period; and from one passage it seems to have been written<sup>2</sup> after the thirty-third year of that king. If Glanville is the earliest writer in our law from whom any clear and coherent account of it is to be gotten, this book is also said to be the first performance that has anything like the appearance of a treatise on the subject of jurisprudence since the dissolution of the Roman empire.<sup>3</sup>

When this book is considered with a view to the progress of our law, it makes a remarkable event in the history of the new jurisprudence. Notwithstanding the attempts of William the Conqueror to introduce the Norman laws, and the tendency in the superior courts to encourage every innovation of that kind, not much had yet been done of a public and authoritative nature to confirm that law in opposition to the Saxon customs. The laws of William, excepting those concerning tenures and the duel, were in the spirit and style of the Anglo-Saxon laws; the same may be said of those which go under the name of Henry I. It is observed that the Constitutions of Clarendon, made about the eleventh year of Henry II., are in the scope of them, as well as the style and language, more entirely Norman than any laws or public acts from the Conquest down to that time.<sup>4</sup> It was not, then, till the reign of this prince that the Norman law was completely fixed here; and when it was firmly established by the practice of this long reign, and had received the improvements made by Henry, then was this short tract drawn up for public use. It is probable this was done at the king's command, in order to perpetuate the improvement he himself had made, and to effect a more general uniformity of law and practice through the kingdom. The work of Glanville, compared with the Anglo-Saxon laws, is like the code of another nation; there is not the least feature of resemblance between them.

While the Norman law was establishing itself here, that nation gradually received an improvement of their own polity from us. The two nations had so incorporated themselves, that the government of both was carried upon the like principle, and the laws

<sup>1</sup> *Vide* Log. Ang.-Sax.

<sup>2</sup> Glanv. lib. 8, c. 2, 3.

<sup>3</sup> Barr. Ant. Stat. This is not true if the *Decretum* is to be considered as a treatise; for Henry II. came to the crown in 1154, and Glanville being written after the thirty-third year of his reign, could not appear till 1187. Now the *Decretum* was published by Gratian in 1149.

<sup>4</sup> Mad. Exch. 123.

of each were reciprocally communicated; a consequence not at all unnatural while both people were governed by one prince. Much more had been done of late in this country than in Normandy for the promotion of legal science. It was not till after the publication of Glanville, and even of Bracton and Britton, that the Normans had any treatise upon their law. One was at length produced in the *Grand Coustumier of Normandy*;<sup>1</sup> a work so like an English performance, that should there remain any doubt of its being formed upon our models, there can be none of the great similarity between the laws of the two nations at this time.

There are some ancient treatises and statutes in the law of Scotland which bear a still nearer resemblance to our English law. The close agreement between Glanville and the *Regiam Majestatem* leaves no room to doubt that one is copied from the other; though the merit of originality between them has occasioned some discussion. An essay has been written expressly on this subject, in which it is said to be clearly proved, by the internal evidence of the two books, that Glanville is the original. It is observed by that writer, that Glanville is regular, methodical, and consistent throughout; whereas the *Regiam Majestatem* goes out of Glanville's method for no other assignable reason than to disguise the matter, and is thereby rendered confused, unsystematical, and in many places contradictory.<sup>2</sup> To this observation upon the method of the *Regiam Majestatem* it may be added, that on a comparison of the account given of things in that and in Glanville, it plainly appears that the Scotch author is more clear, explicit, and defined; and that he writes very often with a view to explain the other, in the same manner in which the writer of our *Fleta* explains his predecessor Bracton. This is remarkable in numberless instances all through the book, and is perhaps as decisive a mark of a copy as can be. The other Scotch laws, which follow the *Regiam Majestatem* in Skene's collection, contribute greatly to confirm the suspicion. These, as they are of a later date than several English statutes which they resemble, must be admitted to be copied from them; and so closely are the originals followed that the very words of them are retained. This is particularly remarkable of the reign of Robert II. in which is the statute *quia emptores*, and others, plainly copied from our laws, without any attempt to conceal the imitation. These laws, at least, can impose upon no one; and when viewed with the *Regiam Majestatem* at their head, and com-

<sup>1</sup> The *Coustumier of Normandy*, according to Basnage, could not have been composed till the reign of Philip the Hardy, who came to the throne in 1272, and reigned fifteen years; and our Edward I. came to the throne in 1272. Upon this statement of dates, it is possible that it might be written after the time of Britton. The language seems to have a more modern form than that of Britton; though this must be attributed to some other cause than such a small space of time as could by any possibility intervene between the writing of these two books.—*Œuvres de Henri Basnage, Avertissement.*

<sup>2</sup> The essay here alluded to is written by Mr Davidson, of Edinburgh. Of this tract I have not been able to get a sight, and am obliged to the preface to the new edition of Glanville for this account of it.

pared with Glanville and the English statute-book, they seem to declare very intelligibly to the world that this piece of Scotch jurisprudence is borrowed from ours.<sup>1</sup>

The *Regiam Majestatem* is so called, because the volume opens with those words: the prologue to Glanville begins *Regiam Potes-tatem*. This whim of imitation is discoverable among our own writers. Fleta begins his Proœmium in the same way, and goes on, for several lines, copying word for word from Glanville. Indeed, the leading idea in all is taken from the Proœmium to Justinian's *Institutes*.

The law-language of these times was *Latin* or *French*, but more commonly the former. The only laws of this time now subsisting in Norman-French, are those which compose the first collection of William the Conqueror. All the other laws from that time to the time of Edward I. are in Latin. There are some few charters of the first three Norman kings which are either in Anglo-Saxon or in Latin, with an English version; of which sort there are several now remaining in the Cottonian and other collections.<sup>2</sup>

Without doubt the Norman laws of William were proclaimed in the county court in Anglo-Saxon, for the information of the English, who still continued to conduct business there in their own language, as they did in all inferior courts; but in the *curia regis* and *ad scaccarium* William obliged them to plead in the Norman tongue, as most consistent with the law there dispensed, and that which was best understood by the justices. However, notwithstanding this language was used in pleading and argument, all proceedings there, when thrown into a record, were enrolled in a more durable language, the Latin. This was the language in which all writs, laws, and charters, whether public or private, were drawn, so that the Norman tongue was of no extensive use here; nor was it till the time of Edward I. that French became of common use in the laws, parliamentary records, and law-books; and this was not the provincial dialect of Normandy, but the language of Paris.

It is believed that few were learned in the laws before the Con-

<sup>1</sup> It seems unnecessary to contend for the originality of the *Regiam Majestatem*, while a doubt of much more importance remains unsettled; this is, whether that treatise, as well as the others in the publication of Skene are now, or ever were, any part of the law of Scotland. Upon this point, some of the most eminent Scotch lawyers are divided. We find Craig and Lord Stair very explicit in their declarations against these laws, as a fabrication and palpable imposition; on the other hand, Skene the editor is followed, among others, by Erskine, Lord Kames, and Dalrymple, who continually refer to them, as comprising the genuine law of Scotland in former times. That a large volume of laws, and law treatises should be pronounced by persons of professional learning to be part of their law and customs, and should be as positively rejected by others, is a very singular controversy in the juridical history of a country: nor is it less singular that this volume should bear such a close similitude with certain laws of a neighbouring state, whose legislature had no power to give it sanction and authority. While a fact of this sort continues unascertained, the history of the law of Scotland must be involved in great obscurity. See Craigii *Inst. Feud.*, lib. 1, tit. 8, sect. 7. Stair's *Inst.*, fo. 3, tit. 4, sect. 27. Skene's Preface to the *Regiam Majestatem*. Erskine's *Prin. Kames' Historical Law Tracts*; and Dalrymple's *Feudal Property*, *passim*.

<sup>2</sup> Tyrrell, ii. 101.

quest, except the clergy. The warlike condition in which that people lived, and the extreme ignorance which universally prevailed among the laity, left very little ability for the management of civil affairs to any but the clergy, who possessed the only learning of the times; in the reign therefore of the Conqueror, in the great cause between Lanfranc and Odo, bishop of Bayeux, it was Agelric, bishop of Chichester, to whom they looked for direction. He was brought, says an ancient writer,<sup>1</sup> in a chariot, to instruct them in the ancient laws of the kingdom, *ut legum terræ sapientissimus*. It was the same long after the Normans settled here.

Miscellaneous  
facts.

In the time of Rufus, one Alfwin, rector of Sutton, and several monks of Abingdon, were persons so famous for their knowledge in the laws, that they were universally consulted, and their judgment frequently submitted to by persons resorting thither from all parts.<sup>2</sup> Another clergyman, named Ranulph, in the same reign, obtained the character of *invictus causidicus*. So generally had the clergy taken to the practice of the law at that time, that a contemporary writer (*a*) says, *nullus clericus nisi causidicus*. The clergy seem to have been the principal practisers of the law, and were the persons who mostly filled the bench of justice.

(*a*) William of Malmesbury. The clergy supplying the lawyers, they would naturally have recourse to the law with which they were best acquainted, the civil law, and the canon law, which, as our author elsewhere observes, was founded thereupon. In other words, they would have recourse to the Roman law, modified, in matters ecclesiastical, by the canon law, the Roman church and its law being established and recognised by the state. Hence the recognition of that law in the *Laws of the Conqueror*, and in the *Leyes Henrici Primi*, which formed the basis of the great treatises of Glanville and of Bracton, the foundations of our common law. Thus, therefore, probability, documentary evidence and the positive facts of history, combine to show that the origin of our law is to be traced back to the Roman law, partly through the traditions and institutions established in this country during the period of the Roman occupation, and partly by reason of the restitution or revival of Roman law, through the medium of the earliest professors of law, the clergy.

<sup>1</sup> Textus Roff.

<sup>2</sup> Dug. Orig. p. 21.

## CHAPTER V.

### HENRY III.

*Magna Charta—Tenures—Alienation—Mortmain—Communia Placita non sequantur Curiam nostram—Justices of Assize—Amercements—Nullus liber homo, &c.—Præcipe in Capite—Sheriff's Criminal Judicature—The Writ de Odio et Atia—Charta de Foresta—The Judicature of the Forest—Punishments—Charters confirmed—Statutum Hiberniæ—Statute of Merton—Of Commons—Of Special Bastardy—Ranks of Persons—Of Villenage—Of Free Services—Of Serjeanty—Scutagium—Homage and Fealty—Of Wardship and Marriage—Of Gifts of Land—by whom—to whom—Of Simple Gifts—Of Conditional Gifts—Of Estates by the Courtesy—Of Reversions—Gifts ad Terminum—Livery—Rights—Testaments—Ecclesiastical Jurisdiction therein—Of Descent—De Partu Supposito—Of Partition—Power.*

HAVING travelled through the early periods of our law, through the profound darkness of the Saxon times, and the obscure mist in which the Norman constitutions are involved (a), we approach the confines of known and established law. In the reign of Henry III. begins the order of statutes on which legal opinions may be founded with certainty. Whatever statutes were passed before this reign, and whatever remembrance we may have of them in annals and histories of the time, they are considered as little more than the remains of antiquity, that illustrate indeed the inquiries of the curious, but add nothing to the body of legal learning. *Magna Charta*, and the statutes of Merton and Marlbridge, passed in this reign, lie within the pale of the English law as now understood; and furnish topics for argument, and grounds for judicial decision. From this time the history of our law becomes more authentic and certain. The constitutions now made produce determined effects; we can trace in what manner they were afterwards altered and modified; can generally fix the era of such alterations; and can always rest secure in the probability of our deductions, while we behold the consequences of them in the present state of our law.

If the statutes furnish authentic documents on which we may

(a) It is impossible not to observe that this darkness would have been lightened and this mist dispersed, had the author been more acquainted with the sources of information open to him, especially the contents of the Saxon laws and the *Mirror of Justice*, and with the compilation called the *Laws of Henry I.* The satisfaction he expresses at having reached the realm of statute law and regular legal treatises, which would enable him to state what the law was at this and any subsequent period of his history, betrays the idea in his mind that thus to state the law at successive stages is all that is involved in legal history. It is conceived, however, that it is desirable, as much as possible, to show the connexion between these different stages and the causes which have led to the changes to be observed. And this object it has been endeavoured, however imperfectly, to aid, in the notes.

rely with confidence, the grounds and principles of the law are investigated and discussed by an author of this reign, whose work may be considered as the basis of all legal learning; the treatise of Bracton will enable us to speak decidedly and fully upon every title in the law, whether civil or criminal. The sketch we have just given from Glanville will now be filled up, and its deficiencies supplied; many of the obscure hints, the doubts, and ambiguities with which that author abounds, will be elucidated; and the whole of our law explained with consistency, and upon undeniable authority. These are the materials from which the juridical history of this king's reign is to be collected. For the matter which they furnish, it may not be raising the expectations of the reader too high, to promise him a full gratification of his thirst for legal antiquities, and the knowledge of judicial proceedings in all their branches. It is rather to be feared, that every one may not entirely assent to the reasons which induced us to enter so minutely into the detail of things; it is thought, however, that it would be less pardonable to give a scanty relation, where the sort of information which is most likely to engage the curiosity of a lawyer depends very often upon circumstances and passages apparently trifling.

The reign of this king, and the remainder of this History, will be divided, conformably with the nature of the materials from which it is formed, into the alterations made by statute, and those made by usage and the decisions of courts. These two sources of variation will be pursued separately, and the amendments made by either stated distinctly, and by themselves. We shall first consider the statutes, and then the decisions of courts. In the present reign we begin with *Magna Charta*, 9 Hen. III., that being the earliest statute we have on record.

Henry III. in the first year of his reign, on the 12th of November 1216, being then only nine years old, by the advice of Gualo, the pope's legate, and of the earl of Pembroke, in the grand council of the realm, renewed the Great Charter which had been granted by his father, together with such alterations and amendments as the circumstances of the times had made necessary.<sup>1</sup> In the September or November following, a new *Magna Charta* was sealed by the pope's legate and the earl of Pembroke, with several additional improvements; at which time the clauses relating to the Forest were first thrown into a separate charter, making the *Charta de Forestâ*.<sup>2</sup>

When the king was declared of age, it was thought that so important an act of his infancy as this should be confirmed; accordingly, in the ninth year of his reign he confirmed the act of the pope's legate and the earl of Pembroke; and granted *Magna Charta* and *Charta de Forestâ* in the form in which they had sealed it, and as we now have them.<sup>3</sup>

Thus was the text of *Magna Charta* and *Charta de Forestâ*, after

<sup>1</sup> 2 Bla. Tracts, ii. Intr. 42.

<sup>2</sup> *Ibid.* n. 52. 60.

<sup>3</sup> *Ibid.* n. 60.

many alterations, finally settled ; nor has there in succeeding times been any amendment made therein. The solicitude of later ages was to obtain frequent confirmations, and a strict observance of these grand pillars of our constitution ; by occasional interpretations to explain any difficulties which might appear in the construction of them ; and to enlarge the benefits they were designed to confer. What were the benefits, liberties, and advantages secured to the people by these famous charters (*a*), and what is the form and style in which they are conceived, it is now our business to inquire.

(*a*) This, which is one of the most interesting questions in our legal history, cannot be understood without some reference to contemporary history. There can be no doubt, it appears on the face of the charters, and is a notorious historical fact, that the barons were the main promoters of the charter ; and *à priori* it might be expected that they would be directed, primarily and principally, at their protection from the exactions and oppressions of the sovereign under the feudal system ; and there can be no doubt that those oppressions and exactions had been enormous, and that some of the most revolting features of the feudal system, especially with reference to the custody of female wards, had been grossly abused by the sovereign, and more particularly by John. There is a passage in the *History* of Sir J. Mackintosh in which he hints that this sovereign had so abused the facilities afforded by these wardships, and contemporary history quite bears out the suggestion. Naturally enough, therefore, the barons would direct their efforts mainly to the restraint of the arbitrary power of the crown with reference to the incidents of the feudal system, which, it will be observed, only applied to those who held by military tenure, and not, therefore, directly to the great body of the people ; those who held of the military tenants by socage or villenage—that is, by plough-service, or the dwellers in towns and cities, who, if they held of the crown at all, held by burgage tenure, and could only be subject to pecuniary exactions. On the other hand, it is to be borne in mind that the incidents of the feudal system applied as between the barons and their military tenants, not less than between the sovereign and the barons ; and contemporary history shows that all the oppressions and exactions which the sovereign practised upon them, they, with a hundredfold greater cruelty and rapacity, practised upon others. This is equally manifest whether we turn to the contemporary chronicles, or take the account given by an acute modern historian, such as Sir J. Mackintosh. The latter indeed quotes from the chronicles some passages which present a terrible picture of the oppressions and cruelties practised by the barons and their knights upon the people all over the country. And there was this terrible difference between their oppressions and those of the king, that they were everywhere, whereas his tyranny was necessarily somewhat limited by the localities in which he happened to reside. In every county, however, there were a host of these feudal barons and knights, each with a fortress or castle, in which was a dungeon, and where the most abominable cruelties were perpetrated, without any possibility of aid from the law, except in the form of armed force and a regular siege of the castle. Hence, in some instances, indeed, as in one very remarkable case in 1224, when one Falcon de Breautc actually seized upon the king's justices, and imprisoned them in his castle, Henry III. had to lay siege to his castle for two months with a strong force in order to take it, and thus vindicate the law and rescue his judges. This single incident, which is narrated in all the chronicles under the year 1224, and occurred, be it observed, in the year when the charter was for the third time ratified by Henry III., will do much to illustrate the character of the age and the real nature of the charter, especially, for instance, as to the remarkable stipulation put into the mouth of the sovereign in the cardinal clause—the celebrated "*nullus liber homo*" clause—which is so often quoted as the palladium of our liberties, "*nec super eum ibimus*," i.e., we will not come upon him with an armed force ; "*nisi per legem terræ*," i.e., by the sheriff or his officers, who would doubtless have been hanged by such gentlemen as Falcon de Breautc over their castle walls, if they had dared to attempt to interfere with them. Read by the light of contemporary history, this clause, which is so loudly vaunted as the palladium of liberty, did but give impunity to tyranny. For in that age, when the civil power was so weak as to be powerless against the military barons and knights each secure in his castle—to say that they should only be touched by the ordinary

The copy of *Magna Charta* in our statute-book is taken from the

course of law was to say that they should enjoy impunity. A reference to the chronicles between the years 1216 and 1224 will show that in every part of the country the barons were practising the most terrible oppressions, although it is equally true that the king, on his part, was practising whenever he could, the most terrible cruelties upon them, and that in point of cruelty he perhaps surpassed them, though not in rapacity. In such a state of things, of course they would naturally be very anxious to protect themselves, although, as regarded the great body of the people, they were the oppressors. And the point of greatest interest in the charter is how far there were any provisions introduced for the protection of the people. The people, be it observed, were out of the scope of the feudal system, in its strict and proper sense, which was purely military. They held, whether as freeholders or as villeins, by plough-service, or such other rustic service, or they held in burgage. They, therefore, were not subject to those incidents of the feudal system which afforded so many pretexts for oppression; and the aggressions upon them were of a wholly different and more lawless character, which may be gathered pretty clearly from the chronicles and the *Mirror*: violent seizures of their property, under colour of distresses, or seizures of their persons to extort ransoms, by imprisonment in the numerous castles, of which there were many hundreds—upwards of a thousand—in different parts of England, each governed by a warden or “constable,” that term not signifying, as it does now, a peace-officer, but a very different sort of character, the keeper of some strong fortress, with a deep dungeon, the scene of dreadful cruelties and extortions. Then the rivers, which then were swarming with fish (not having been befouled and polluted by towns), were too often monopolised by the local tyrants by means of “weirs” or fishing dams. And merchants were subject to ruthless extortions, under the name of tolls, in going through the lands of these feudal tyrants to get to the towns where they carried on trade. Thus on every side the people were subject to oppressions, and robberies, and cruelties; and the practical way to test and appreciate the charters is to bear all this in mind, and see how far its different provisions tended to protect the people from these oppressions, which resolves itself into a twofold question: first, how far they were prohibited; and, next, how far they were to be prevented. The mere declaration that they were prohibited came to little in that age. Such declarations had been made in favour of the laws and liberties of the people by every sovereign since the Conquest, and as uniformly disregarded and set at naught. The great point was as to the practical means of preventing these things, which it is manifest could only be done by securing the supremacy of law, and this could only be done by improving and strengthening the judicial constitution of the country, and enabling them to carry out the law. But here, again, was a great difficulty. *Quis custodiet ipsos custodes?* Who should keep the guardians themselves under control? The sheriffs and justices of the king were themselves generally knights or barons, who belonged to the very same class as the oppressors of the people, and who were as ready, for fees or salaries, to practise for the enrichment of the king the same exactions and oppressions which others of the same order practised for their own. Hence, though justices itinerant had been going their circuits since the reign of Henry I., their exactions and oppressions, in levying fines or “amercements,” (which, there is reason to suspect, was the great reason of their appointment) were so intolerable, that it appears the people often dreaded their approach, regarding them as oppressors instead of protectors, and actually remonstrated against them being sent oftener than once in seven years. That the charter did not altogether give satisfaction to the great body of the people in the age in which it was granted, and that even where its terms were satisfactory they were not carried out, is manifest from a chapter in the *Mirror*, entitled, “The Defects of the Great Charter,” which will afford the best possible commentary upon it, and which commences thus: “Seeing how the law of the realm, founded upon forty points of the great charter of liberties, is *damnablely misused* by the governors of the land, and by statutes afterwards made contrary to some of the points; to show the defects or defaults in these points, I have put this chapter, first of the defects of the great charter.” And then a variety of points are mentioned, on each of which the comments made will be inserted in the notes to the clause in which it arises. This, it is manifest, will be that contemporaneous exposition which is the best possible commentary on any ancient statute, whence the change, subsequently made, from justices itinerant, who went yearly, to “justices in eyre,” who went only septennially (*vide ante*). In such a state of society, it is manifest that,



roll of 25 Ed. I., and is only an *Inspecimus* of the charter of the ninth of Henry III., so called from the letters patent prefixed in

as Guizot points out, the great difficulty was in the guarantees or securities for liberty. As to the law, there was no doubt about it at all. And the very necessity for repeatedly affirming it showed the real difficulty lay in its execution and enforcement. It is to this point, then, principally, as by far the one most practically important, the readers of the charters must attend, in order to judge of their practical worth and value. Mere declarations of that law, no doubt, were in that age not without value; but it must be evident that the great point was, what guarantees or safeguards should be provided. Two points, then, have to be kept in mind in examining the charter: first, what provisions it contained to protect the people not only against the king, but against the barons and other powerful persons; and next, what provisions it contained for practically carrying out these protective enactments. As to the first point, it is remarkable that, as already observed in the chief clause, the celebrated "*nullus liber homo*" clause certainly applies to all freemen, though it contains no practical guarantee, as the commentator in the *Mirror* observes, but rather takes one away, or tries to do so, by making the sovereign undertake not to come upon any freeman, except in due course of law, which, as the great oppressors of the people were too powerful for the ordinary course of law, would secure them from any effective measures of redress, unless, indeed, they actually proceeded to levy war. But then it does not apply to villeins, a large and important class, comprising still the great body of the people, who, as the *Mirror* points out, were not slaves, nor to be regarded or treated as such, or as if they had no personal rights, so that they could be beaten or imprisoned at leisure; yet the charter contains not a word in their favour, and hence, as the *Mirror* says, in a passage at the end, written not long after the final confirmation of the charter by Edward I., "It is an abuse to hold villeins for slaves, and this abuse causeth great destruction of poor people, and is a great offence" (c. v. s. 2); but there is nothing against it in the *Mirror*. And although, in the clause about amercements, all villeins are included, as well as all freemen, and it is said that their amercements must be, saving their "wains" or waggons, that was as much for their lord's benefit as their own, and indeed more so, since they could only use their waggons upon their lord's lands, having no property of their own. As regards the great body of the freemen, the common freeholders, no doubt they appear to share in most of the principal clauses in the charter in which they could be included—those relating to personal liberty and rights of property, &c. But the bulk of the charter relates to feudal matters which concerned the barons and knights who held by military tenure, and the only guarantee contained in the first great charter consisted, in fact, as Guizot points out, in their own assumption of supreme powers; for it was provided by John's charter that a select body of the most powerful barons might, if they deemed the charter to have been infringed, make war upon the king to compel its observance—i.e., its observance according to *their* ideas, which was, as Guizot says, the right of civil war; and accordingly it led to civil war, which lasted, more or less, for many years, and in the result it is remarkable that a charter was obtained in several respects *less* favourable to the people than the *first*, and especially in the omission of the important provision that scutage should only be levied by consent of a common council of the realm, which contained in it the germ of a representative assembly, the effectual guarantee of popular liberty, at all events against the crown. And as the provision for a guarantee of the charter by the barons was omitted, there was no additional guarantee or security afforded by the charter, as now finally settled; and it consisted entirely of declarations of the law, no doubt, in that age, so far as they went, useful and valuable. As to this, indeed, one of our historians, Dr Henry, observes, that the charter was conceived entirely in the interest of the nobility, and that the only article in favour of the people—the one which applied to the barons the same enactments which they had applied to the king—was inserted at the instance of the king (*Hist. Eng.*, v. 1). This, however, is not a fair representation, for though it may be that the charter was conceived and intended chiefly in the interest of the barons, it did contain provisions which embraced all freemen, and, moreover (what is of infinitely greater importance), it contained the great principles which, though perhaps intended for the benefit of a class, proved the fruitful germs of rights and immunities for the whole body of the nation, and were growing and developing for ages. To trace this progress and development is the great object of the legal history of the

the name of Edward I. *INSPEXIMUS Magnam Chartam domini Henrici quondam regis Angliæ patris nostri de libertatibus Angliæ*

subsequent periods. No one will regret the insertion of an admirable passage from Sir J. Mackintosh, in which that great historian sums up in a masterly manner the effect of John's charter: "Many parts of the great charter were pointed against the abuses of the power of the king, as lord paramount, and have lost their importance since the downfall of the system of feuds, which it was their purpose to mitigate. But it contains a few maxims of just government applicable to all places and times, of which it is scarcely possible to overrate the importance of the first promulgation by the supreme authority of a powerful and renowned nation. Some clauses, though limited in words by feudal relations, yet covered general principles of equity, which were now slowly unfolded, by the example of the charter and their obvious application to the safety and well-being of the whole community. Aids or assistance in money were due from any vassal for the ransom of his lord, for the knighting of his eldest son, and for the marriage of his eldest daughter. But they were often extorted when no such reasons could be urged. Escuage or scutage was a pecuniary compensation for military service, but as the approach of war was an easy pretext, it was liable to become abused. Tallage, an impost assessed on cities and towns, and on freemen who owed no military service, according to an estimate of their income, was in its nature very arbitrary. The barons, in their articles, required a parliamentary assent to the tallages of London, and all other towns, as much as to the aids and scutages which fell upon themselves. By the charter itself, however, tallage was omitted, though the liberties of the town were generally asserted. But it contained the memorable provision: "No scutage or aid shall be raised in our kingdom (except in the above three cases) but by the consent of the general council"—a concession sufficient to declare a principle which could not long remain barren, that the consent of the community is essential to just taxation. By the charter, as confirmed in the next reign, even scutages and aids were reserved for further consideration. But the formidable principle had gone forth, though every species of impost without the consent of parliament was not renounced expressly until the *confirmatio chartarum*, in the 25th Edward I., fourscore years after the grant of the Great Charter. "To constitute the common council of the kingdom," says the charter, "we shall cause the prelates and greater barons to be summoned, and shall direct our sheriffs to summon all who hold of us in chief." To the upper house of parliament this clause is still applicable. From the lower house it essentially differs by excluding representation. It presents, however, the first outlines of a parliamentary constitution. The 39th article of the charter is that which forbids arbitrary imprisonment and punishment without lawful trial: 'Let no freeman be imprisoned, &c., otherwise than by the legal judgment of his peers, or by the law of the land.' In this article are clearly contained the *habeas corpus* and the trial by jury, the most effectual securities against oppression which the wisdom of man has hitherto been able to devise. 'We will sell, delay, or deny justice to no one.' No man can carry further the great principle that justice is the great debt of the government to the people, which requires that law be rendered cheap, prompt, and equal. The provision which directs that the supreme civil court shall be stationary instead of following the king's person, is a proof of that regard to the regularity, accessibility, independence, and dignity of public justice which characterises that venerable monument of English liberty. The language of the Great Charter is simple, brief, general without being abstract, and expressed in terms of authority, not of argument, yet commonly so reasonable as to carry with it the intrinsic evidence of its own fitness. It was understood by the simplest of the unlettered age for whom it was intended. It was remembered by them, and, although they did not perceive the extensive consequences which might be derived from it, their feelings were, however unconsciously, elevated by its generality and grandeur. It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required, and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded. To all mankind it set the first example of the progress of a great people for centuries in blending the tumultuary democracy and haughty nobility with a fluctuating and vaguely united monarchy, so as to form,

*in hæc verba.* Then follows *Magna Charta* nearly in the form of that granted by Henry III. (a)

*Magna Charta* contains fifty-seven chapters, composing a rhapsody of ordinances for the settling or amendment of the law in divers particulars at that time anxiously contended for. The whole is strung together in a disorderly manner, with very little regard to the subject matter. If we were to judge, from the face of the instrument itself, of the chief design of the barons in obtaining this charter, we might be inclined to think that their great object was to ascertain the services and burthens arising from tenures; for the first six chapters are wholly confined to that subject, and many others relate incidentally to the same point; the consequence of which is, that many parts of this famous charter have become obsolete, and, to a modern reader, almost unintelligible. Other parts of it, however, are extremely worthy of notice, even at this day; as they, at the time, contributed to confirm, if not establish, certain branches of our juridical constitution; and, what is more important, to lay down certain general principles, which have had an extensive influence on our law in all its branches ever since; as our civil liberty and private rights became thereby better defined, and were considered as settled on the firm basis of parliamentary recognition.

To explain in what manner this was done, it will be proper to state at length the subject of *Magna Charta*; which we shall attempt in an order differing from that in which the *Magna Charta* text appears, but which will, perhaps, bring the contents of it into a clearer light than the original appears in. We shall first speak of such provisions as are of a more general or miscellaneous nature; then of those which relate to tenures and property; after which will follow the regulations ordained for the administration of justice.

The address and general preamble to the charter are deserving notice, as they show the form in which these solemn acts were usually authenticated: it is addressed in the name of the king, "To all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, officers; and to all bailiffs, and other our faithful subjects, who shall see this present charter, greeting. Know ye, that we, unto the honour of Almighty God, and for the salvation of the souls of our progenitors and successors kings of England, to the advancement of holy church, and amendment of our realm, of our

from these discordant materials, the only form of free government which experience would show to be reconcilable with widely extended dominion" *History of England*, v. 1.)

(a) Varying in some respects from the charter of John, as that did from the articles, but no doubt substantially the same. It is to be observed that the author's citations are all from the *Inspecimus* charter of Edward I., which it is necessary to notice, because the arrangement and numbering of the charters varies in every one of them; so that reference to that of Edward I. will not apply to any of those of Henry III. The author's are all to that of Edward I.

mere and free will,<sup>1</sup> have given and granted<sup>2</sup> to all archbishops, bishops, abbots, priors, earls, barons, and to all freemen of this our realm, these liberties following, to be kept in our kingdom of England for ever."

Such is the manner in which the provisions of *Magna Charta* are introduced; after which comes the first chapter, containing a general grant in the following terms: "First, we have granted to God, and by this our present charter have confirmed, for us and our heirs for ever, that the church of England shall be free, and shall have all her whole rights and liberties inviolable (a). We have granted also and given to all the *freemen* of our realm, for us and our heirs for ever, these liberties under-written, to have and to hold, to them and their heirs, of us and our heirs for ever." What these liberties were we shall now inquire.

It was ordained that the city of London shall have all the ancient liberties and customs which it had been used to enjoy; and that all other cities and towns, and the barons of the cinque or other ports, should possess all their liberties and free customs.<sup>3</sup> As many exactions had been made during the reigns of Richard and John for erecting bulwarks, fortresses, bridges, and banks, contrary to law and right, it was declared that<sup>4</sup> no town or freemen should be distrained to make bridges or banks, but only those that were formerly liable to such duty in the reign of Henry II., a period which was often referred to, as an example for correction of enormities, and the due observance of the laws. For the same reason, none were to appropriate to themselves a several right<sup>5</sup> in the banks of rivers, so as to exclude others from a passage there, or from fishing, except such as had that right in the reign of Henry II. (b).<sup>6</sup> All weirs in the Thames and Medway, and all over England,

(a) The *Mirror*, upon this point, says, "It was necessary to ordain a corporal punishment—namely, to the lay judges, the king's ministers, and others, who judge clerks for mortal crimes to corporal punishments, and do detain their goods after their purgation; and to those secular judges who take upon them cognisance of causes of matrimony and testaments, or other special things" (c. v. s. 2). And, accordingly, subsequent statutes were passed to restrain the lay judges from these latter matters. As to the other point, the cognisance taken by secular judges of the offences of clerks, it is remarkable that it was the very point on which the controversy arose between Henry II. and the Archbishop à Becket; and, according to the *Mirror*, it was an abuse which plainly shows that the Constitutions of Clarendon were not considered laws.

(b) The comment of the *Mirror* upon this is, "The point which forbiddeth that rivers be defended is misused, for many rivers are now appropriated and put in defence which used to be common for fishing in the reign of king Henry I." (c. v. s. 2). Hence it is manifest that the clause was understood to be in *pari materia* with the next mentioned, and which, therefore, our author couples with it as to the weirs. The intention evidently was to prevent any persons from appropriating to themselves a fishery in any part of the rivers which was common property, and thereby committing a purpresture, as it was called in ancient times, from *pour-pres*, an enclosure. Thus Glanville, in treating of purprestures, says that to erect any obstruction over public waters, across their regular course, was to be considered as such (*vide* Glanville, lib. xiv.). Nor would it of course be less unlawful if in a public navigable river it

<sup>1</sup> *Spontaneâ et bonâ voluntate nostra.*

<sup>2</sup> *Mag. Chart.*, ch. 9.

<sup>3</sup> *Vide* Harg. *Tracts*, p. 7, "De defensione repariæ," &c.

<sup>4</sup> *Dedimus et concessimus.*

<sup>5</sup> *Ibid.* ch. 15.

<sup>6</sup> *Mag. Char.* ch. 16.

were to be destroyed, except such as were placed on the coast.<sup>1</sup> One standard of weights and measures was established<sup>2</sup> throughout the kingdom.

A provision was made respecting merchant-strangers, which evinces how very early a regard was had to the interests of trade. Before this, it should seem, that merchant-strangers, though in amity, used to be laid under certain prohibitions;<sup>3</sup> for it was now provided,<sup>4</sup> that all merchants, unless they were before publicly prohibited, should have safe and sure conduct in the seven following instances: 1st, to depart out of England; 2dly, to come into England; 3dly, to tarry here; 4thly, to go through England, as well by land as by water; 5thly, to buy and sell; 6thly, without any manner of evil tolls; 7thly, by the old and rightful customs. But this was only while their sovereign was in amity with our nation; for, in time of war, merchant-strangers, being enemies, who were here at the beginning of the war, were to be attached, without harm of their body or goods, till it was made known to the king or his justiciar<sup>5</sup> how our merchants were treated in the enemy's country, and they were to be dealt with accordingly.

These are the provisions of the Great Charter that are not easily reducible to any of the following heads, to which we are now proceeding. We shall first speak of the regulations relating to tenures.

**Tenures.** If any earl, or baron, or other person holding of the king in chief by knight service, died, and at the time of his death his heir was of full age, it was ordained, that he should have his inheritance upon paying the old relief; that is, the heir of an earl was to pay for his earldom £100, the heir of a baron for his barony 100 marks, and the heir of a knight 100 shillings for every knight's fee; and so in proportion (*a*).<sup>6</sup>

Notwithstanding these reliefs of baronies and earldoms are called the old relief, we have before seen, that in the time of Glanville obstructed the navigation, although the purview of these clauses appears to have been rather the fisheries. Weirs were large dams made across rivers, either for the taking of fish or the conveyance of water to a mill; and the peculiar kind mentioned in the charter by the term *keydells*, were dams having a loop or net in them, and furnished with wheels and engines for catching fish. They are now called *kettles* or *kettle-nets*, and are still in use on the sea-coast of Kent and Cornwall. The removal of them from the Thames and Medway is directed in several ancient charters beside the present, by John in the first Great Charter, and by Henry III. in his first charter. So they were afterwards prohibited by various statutes (*Stow's Surrey*, b. i. c. viii.) Henry III. prohibited weirs in the Thames under the penalty of £10, an enormous sum in those days; and afterwards the penalty was increased to 100 marks, or £66, 13s. 4d., as much as the whole salary of a judge or chancellor in those days, and probably equal at least to £1000 in our own time—perhaps to £2000.

(*a*) Here, again, how practical the commentator in the *Mirror* is: "This seemeth to be defective, for as the relief of an earldom was to decrease on him who held less; so it seemeth that it was to increase as much, if an earl held more, so as he who held two earldoms, and who held an earldom and a barony, shall pay as an earldom and a barony; and so of other fees, if they be not expressed in the charter, that the fine of one hundred pounds be not on an earldom, for no point increased; and so of other certainties."

<sup>1</sup> Mag. Char. ch. 23.

<sup>4</sup> Mag. Char. ch. 30.

<sup>2</sup> *Ibid.* ch. 25.

<sup>5</sup> *Capituli justiciario nostro.*

<sup>3</sup> 2 Inst., 57.

<sup>6</sup> Mag. Char. ch. 2.

such reliefs were not fixed by law, but depended on the pleasure of the prince, and therefore must have been a ground of continual discontent; the knight's relief here prescribed is the same as it was in Glanville's time.<sup>1</sup>

In cases where the heir was within age at the death of his ancestor, it was provided,<sup>2</sup> that the lord should not have the ward of him nor of his land before he had taken homage of him. This was in confirmation of the common law stated by Glanville,<sup>3</sup> and was now enacted for better security of heirs against their lords; namely, that before the lord should have benefit of the wardship, he should be bound to two things: 1st, to warrant the land to the heir; 2dly, to acquit him from service, and other duties to be done and paid to all other lords; both which the lord was bound to do, if he had accepted homage of his tenant (*a*). It was moreover declared, in confirmation likewise of the common law, that when such a ward came of age, that is, to twenty-one years, he should have his inheritance without relief and without fine (*b*). Notwithstanding such heir within age was made a knight, and so might be judged fit to do the service of a knight himself, it was provided, that though this might discharge his person from ward, yet his land should remain in the custody of his lord till he came of age.<sup>4</sup>

• The obligation to restore the inheritance to the heir, without destruction or waste, was ascertained more precisely, though in the spirit of the old common law.<sup>5</sup> It was enjoined<sup>6</sup> that the keeper of the land (that is, the guardian of such an heir within age) should only take reasonable issues, and reasonable customs and services, without making destruction and waste of his men, his villains, or his goods. Where a committee of the custody of the king's ward, whether he was the sheriff, as was then usual, or any other person, was guilty of waste or destruction, he was to make recompense; and the land was to be committed to two discreet men of that fee, who were to account for the issues. Likewise,

(*a*) Here the *Mirror* observes, "The point is defective (though it be that it is grounded upon law, to bind the lords of fees to warrants by taking of homages, whether they took them of the right heir or not), because it is not expressed who should be guardian of the fees in time of vacancy, and have the issues in the meantime, in cases where the right heirs fly from their lords, and cannot or will not do them homage."

(*b*) Upon this the *Mirror* observes, "The point is defective, for as much as no difference is expressed between the heirs male and the heirs female; for a woman hath her age when she is fully of fourteen years, and the seven years besides were not ordained first but for males, who, before the age of twenty-one, were not sufficient to bear arms for the defence of the realm. And note that every guardian is chargeable to three things—(1) that he maintain the infant sufficiently; (2) that he maintain his rights and inheritance without waste; (3) that he answer and give satisfaction of the trespasses done by the infant." The defects of the point of disparagement, it is added, appeareth among the statutes of Merton, in which there is a provision connected with the subject. And the default of freebench and widows, in the same manner, on which point it is sufficiently expressed that no woman is dowable if she have not been solemnly espoused at the door of the church or monastery and there endowed. The *Mirror* elsewhere says, that every one might endow his wife, *ad ostium ecclesiæ*, without the consent of the heirs. And so it is in Glanville.

<sup>1</sup> *Vide ante*, 127.

<sup>4</sup> Mag. Char. ch. 3.

<sup>2</sup> Mag. Char. ch. 3.

<sup>5</sup> *Vide ante*, 114, 115.

<sup>3</sup> *Vide ante*, 129.

<sup>6</sup> Mag. Char. ch. 4.

where the king gave or sold the custody, and waste was done, the custody was to be forfeited, and to be committed to two persons of that fee, as before mentioned. It was also directed, that those who had the custody of the land of such an heir<sup>1</sup> should, out of the issues and profits thereof, keep up the houses, parks, warrens, ponds, mills, and other things appertaining to the land, and should deliver to the heir, when he came of full age, all his land, stored with ploughs and other implements, at least in as good condition as he received it in. It was provided, that all the above-mentioned regulations should be observed in the custody of archbishoprics, bishoprics, abbeys, priories, churches, and dignities vacant that belonged to the king; with this exception, that the custody of *them* was never to be sold (a). As to abbeys not of the king's foundation, it was declared<sup>2</sup> that the patrons of them, if they had the king's charters of advowson, or had an ancient tenure or possession, were to have the custody of them during their vacancy.

In addition to these provisions, it was moreover declared, as it had been before held at the common law, that heirs should be married without disparagement.<sup>3</sup>

Several abuses of purveyance, as well as of tenures, were removed or corrected. No constable of a castle or bailiff<sup>4</sup> was to take corn or cattle of any one who was not an inhabitant of the town where the castle was, but was to pay for the same; and even if the owner was of the same town, it was to be paid for in forty days. No con-

(a) This deserves notice. The terms of the charter are, that the *wardships* shall not be sold, which meant far more than that the mere custody of the sees should not be sold. It is to be observed that the king had the power of terminating the vacancy of a see at any moment, by allowing the free elections to take place, which was expressly stipulated for in the first Great Charter—that of John—and which was implied and recognised in the present (though the express stipulation was omitted) by the general confirmation of all the liberties of the church. The vacancy, therefore, was, after the brief time necessary for a canonical election, simply an act of wrong on the part of the king, and it was done not only for the sake of getting the profits of the temporalities, but of coercing payment of a sum of money for the liberty to come to an election; or from the bishop elect, in order to obtain possession of his temporalities. The contemporary chronicles and the records show that this was so, and that Henry II. held as many as six or seven bishoprics vacant at a time, although he had solemnly engaged to observe the charter of Henry I., which declared that he would not sell or farm the bishoprics, nor take money to allow the entry of successors; and this he defined as the “freedom of the clerics.” “*Quia regnum oppressum erat injustis exactionibus, ego sanctam Dei ecclesiam liberam faciam, ita quod nec vendam nec ad firmam ponam, nec, mortuo archiepiscopo, vel episcopo, vel abbate, aliquid accipiam de domino ecclesie vel hominibus ejus donec successor in eam ingreditur*” (*Charter of Hen. I. c. i.*) It was this which the present clause was intended to prevent. The mere occupation of the custody of the sees was virtually an usurpation, for they were properly in the custody of the deans and chapters in the case of a bishop, or of the archbishop of the province, which appears from a passage in Bracton, where he speaks of the archbishop as having the custody of the see of Rochester, and the king as having the right of custody of the archbishopric in case the archbishop should die (*Bracton*, fol. 400). The mere stipulation that the wardships of vacant sees should not be sold, of itself implies that they had been sold, and shows the real motive for the anxiety to possess the custody of the vacant sees, and for keeping them vacant, in order to have the custody.

<sup>1</sup> Mag. Char. ch. 5.

<sup>3</sup> *Ibid.* ch. 6. *Vide ante*, 116.

<sup>2</sup> *Ibid.* ch. 33.

<sup>4</sup> *Ibid.* ch. 19.



stable of a castle was to distrain a knight to give money for keeping castle-guard, if he would do it in person, or cause it to be performed by some other who was able, and he could show a reasonable excuse for his own omission; if a person liable to castle-guard was in the king's service, he was, for the time, to be free from castle-guard.<sup>1</sup> No sheriff or bailiff of the king was to take any horses or carts for the king's use but at the old limited price—*i.e.*, says the statute, for a carriage and two horses, 10d. per day; for three horses, 14d. per day: the demesne cart, however, or such as was for the proper and necessary use of any ecclesiastical person, or knight, or any lord, about his demesne lands, was to remain exempt, as had been by the ancient law (*a*). Again, neither the king nor his bailiffs or officers were to take the wood of any person for the king's castles, or other necessities to be done, but by the licence of the owner.<sup>2</sup> These limitations upon services of tenure and upon purveyance, were great benefits to the subject, and so far protected him against these arbitrary claims.

Certain declarations were made as to the nature of tenure, in some instances. The king's prerogative, in cases of ward, was declared in the following manner:—If any held of the king in fee-farm,<sup>3</sup> or by socage, or in burgage, and held lands of another by knight's service, the king was not, by reason of such fee-farm, socage, or burgage-tenure, to have the custody of the heir, nor of the land holden of the fee of another; nor was he to have the custody of such fee-farm, socage, or burgage, except knight's service was due out of the said fee-farm; nor was the king, by occasion of any petit serjeanty, by a service to pay a knife, an arrow, or the like, to have the custody of the heir, or of any land he held of any other person by knight-service;<sup>4</sup> all which seem to be only more explicit declarations of what the common law was thought to be before.<sup>5</sup>

It was deemed proper to guard against such conclusions as might be founded on the above, or on any other prerogative, in case of baronies escheating to the crown: it was therefore declared, that if any man held of an escheat, as, for instance, of the *honour*

(*a*) Upon this the comment in the *Mirror* is, "That which is forbidden to constables to take is forbidden to all men, as there is no difference in taking from another against his will, whether it be horses, victuals, merchandise, carriages, or other manner of goods" (*c. v. s. 2*). The term purveyance is derived from the French, *pourvoir*, to provide, and its legal meaning was providing for the king's household, by his officers, who exercised a prerogative of pre-emption—of buying provisions at a certain rate, to the preference of all others, and even without the owner's consent. It embraced also the power of conveying the horses and carriages of the subject to execute the king's business on the public roads in the conveyance of timber, stores, baggage, &c., upon payment to the owner of a fixed rate. The officers here called constables are the castellans, or keepers of castles; who, in those days, were plunderers, who preyed upon the people. Lord Coke, in commenting on the clause, says, that the constable of a castle had no right to take purveyance at all, though it was a castle for the defence of the realm, as purveyance was only for the royal residence.

<sup>1</sup> Mag. Ch. ch. 20.

<sup>2</sup> *Ibid.* ch. 21.

<sup>3</sup> That is, an inheritance with a rent reserved in fee, equal to, or at least a fourth of that for which the same land had been let to farm.

<sup>4</sup> Mag. Char. ch. 27.

<sup>5</sup> *Vide ante*, 115.



(for so it was in such case called) of Wallingford, Nottingham, or any other escheat, being in the king's hands and being a barony, and died, his heir should give no other relief to the king than he did to the baron when it was in his hands; nor should he do any other service to the king than he should have done to the baron. The king was to hold the honour or barony as the baron held it—that is, of such estate, and in such manner and form, as the baron held it; and he was not, by occasion of such barony or escheat, to have any escheat but of lands holden of such barony; nor any wardship of any other lands than what were holden by knight's service of such barony, unless he who held of the barony held also of the king by knight's service *in capite*;<sup>1</sup> from which it appears, that he who held of the king must hold of *the person of the king* and not of any honour, barony, manor, or seignior.<sup>2</sup>

These provisions about tenures were followed by one which was designed for the preservation of tenures in their pristine vigour and importance. We have seen<sup>3</sup> what alteration had gradually taken place in the original strictness with which alienation of land had been restrained; so that, as the law now stood, where the tenure was of a common person, the tenant might in many cases make a feoffment of part thereof, either to hold of himself or of the chief lord. A feoffment of the latter kind seemed no way prejudicial to the lord, who still saw the land in possession of a person who was his homager: but when the tenure was reserved to the feoffor, the homage, as far as regarded that portion of the land, passed from the lord to the feoffor. These subinfeudations, as they, in a degree, stripped the mesne lord of his ability to perform his services, were found very prejudicial to the objects of the feudal institution; and therefore the following regulation was made:<sup>4</sup>—namely, that for the future no freeman should give or sell any more of his land than so as what remained might be sufficient to answer the services he owed to the lord of the fee.

In what manner this prohibition affected tenants *in capite*, has been somewhat doubted. Some have held that the law never allowed tenants *in capite* to alien without a licence from the king, and paying a fine: some, that after this act, land so aliened without license was forfeited to the king. Others again held, that the land, in such case, was not forfeited, but was seized in the name of a distress, and a fine was thereupon paid for the trespass; of which latter opinion is Lord Coke. This question remained undetermined for the space of one hundred years, when it was settled by statute 1 Edward III. c. 12, which declares that the king should not hold such land as forfeit, but that a reasonable fine should be paid in the chancery.

But in the case of common persons who aliened in violation of this prohibition, the law was different; for it is the common

<sup>1</sup> Mag. Char. ch. 31.

<sup>2</sup> *Vide ante*, 43, 104, 105.

<sup>3</sup> 2 Inst., 64.

<sup>4</sup> Mag. Char. ch. 23.

opinion, that the act was interpreted in this manner: when a tenant aliened part of his land contrary to this act, the feoffor himself, during his life, could not avoid it; but his heir, after his decease, might avoid it by force of this act; but if the heir had joined with his ancestor in the feoffment, or had confirmed it, neither he nor his heirs could ever avoid it; and if the heir had entered under the sanction of this act, the alienee of part might plead, that the service whereby the land was holden, could be sufficiently provided for out of the residue; upon which issue might be taken. There are many precedents where this provision had been so tried, before the statute of *quai emptores*, 18 Edward I., which repealed this prohibition, and gave every one free liberty to alien his land in part, or in the whole,<sup>1</sup> with a reservation of the services to the chief lord.

Other means by which the end of tenures was defeated, were alienations in mortmain; for in consequence of these, the military service decayed, and lords lost their Mortmain. fruits of tenure. Lands given to religious houses continued in an unchangeable perpetuity, without descent to an heir; and therefore never produced the casualties of wardships, escheats, relief, and the like (a). On this account many landholders would insert a clause in the deed of feoffment, *quod licitum sit donatori rem datam dare, vel vendere cui voluerit, exceptis VIRIS RELIGIOSIS*.<sup>2</sup> It was now endeavoured to put a stop to these gifts by a general provision; which was conceived in a way best calculated to meet the devices then made use of to elude the force of restrictions like that just

(a) This deserves attention, for it throws light upon an important question—the real policy of the legislation against alienation to religious houses, or ecclesiastical bodies; and also upon another subject, as to the interference of the crown in ecclesiastical matters. It is here declared to have been the loss of feudal services. Then it follows, that when lands were thus alienated, it was well known that such services were not claimable, and that it was so is undoubted law. The reason was that the very nature of the tenure on which these bodies held their lands, tenure in “free alms,” or “frankalmoigne,” excluded (to use Littleton’s language) the lords from having any earthly service. Thus the *Mirror* states, that some received their lands to hold for the defence of the realm, and some received them upon no obligation of services as tenants in frankalmoigne (c. ii. s. 28). And Glanville also states that the lands of the bishops, &c., were held in frankalmoigne (lib. 7. c. i.) Hence they owed no military service, and hence the present enactment, and subsequent enactments of a similar nature. It will be observed, however, that this legislation was originally directed not so much against real as against colourable alienations of land, for the mere purpose of evading the military services, or the other odious and oppressive incidents of feudal tenure. The charter points at pretended donations with the intention of taking back the lands again, and with the evident object of receiving them free from feudal obligations. This was considered as a fraud upon the feudal lords; and hence this provision, which, however, affords an indirect proof of what all historians attest, that men very much preferred ecclesiastical lords, so that it was a maxim—“It is better to live under the cross than under the lance.” That the clause was not aimed especially at the church, appears from another clause, that no freeman shall give or sell any more of his lands; but so that of the residue of his lands the lord may have the service due to him which belongeth to his fee (c. xxxii.), whence the subsequent statute of Edward I., *Quia emptores*, to prevent subinfeudations.

<sup>1</sup> 2 Inst. 66.

<sup>2</sup> Bract. fol. 13 (?—No such passage can be found there.)

mentioned. It was ordained, that<sup>1</sup> it should not, for the future, be lawful for any one to give his land to a religious house, and to take back again the same land to hold of that house; nor, on the other hand, should it be lawful for a religious house to take lands of any one, and lease them out to the donor. Moreover, if any one was convicted of giving his land to a religious house, the gift was to be void, and the land was to accrue to the lord of the fee. This provision is abridged, and the effect of it declared by the statute of mortmain in the next reign.<sup>2</sup> "Of late," says that act, "it was provided, that religious men should not enter into the fees of any, without licence and will of the chief lord of whom such fees be holden immediately;" because if they did, the lord would claim them as forfeit. It is plain from this chapter of *Magna Charta*, particularly from this exposition of it, that gifts of land to religious houses were thereby prohibited generally—that is, even in cases where the religious house did not give the land back to hold of the house, but kept it to themselves in their own hands.<sup>3</sup>

Among other severities attending the condition of tenures, that which related to the dower and marriage of widows was not the least. It seems from the following passages that some impediments were thrown in the way of their just rights, which are not noticed in any document we have hitherto met with. It was declared, that a widow,<sup>4</sup> immediately after the death of her husband, should, without any difficulty, have her *maritagium*<sup>5</sup> and inheritance; and should give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of her husband's death; by which must be meant some estate in *frank-marriage*, or *conditional fee*. She was, moreover, to continue, if she pleased, in the chief house of her husband, unless it was a castle, for forty days (called her *quarantine*) after his death; within which time her dower, if not assigned before, was to be assigned to her: and when she departed from the castle, a competent house was forthwith to be provided for her, where she might have an honourable residence till the assignment; and in the meantime

<sup>1</sup> Ch. 36.<sup>2</sup> 7 Ed. I.<sup>3</sup> 2 Inst. 74, 75.<sup>4</sup> Ch. 7.

<sup>5</sup> Lord Coke interprets this passage thus: "Widows are without difficulty to have their marriage (that is, to marry where they will, without any licence or assent of their lords) and their inheritance," &c., a construction which has too strong reasons against it. For, first, *maritagium* is generally used by the writers of this period for an estate in *frank-marriage*, and coupled as it here is with *hereditas*, it seems to require that sense. Secondly, this construction is directly contrary to the latter part of this very chapter of *Magna Charta*, where it is expressly declared that widows *shall not* marry without the assent of their lord. Indeed, Lord Coke found it convenient to comment away the meaning of the passage also, which he has done in these words: "That is to be understood where such licence of marriage in case of a common person was due by custom, prescription, or special tenure; and this exposition is approved by constant and continual use and experience, *et optimus interpret legum consuetudo*" (2 Inst. 18). The latter position I admit most fully, and beg leave, upon the authority of it, to oppose the testimony of Bracton and Britton to that of our author. It is laid down by both of those writers, as will be shown in its proper place, that this was the general law of the land; though I do not mean to dispute, but that the law in Lord Coke's time might be as he has delivered it in this place. This is one strong instance, among many others, that our best writers have fallen into the error of canvassing points of ancient law upon principles and ideas wholly modern. [A very just observation.]

she was to have reasonable estovers of common. For her dower she was to have assigned to her a third part of all the lands of her husband, which were his during the coverture, unless where it happens that she was endowed of less at the church-door. By this description, the widow's dower was enlarged; for in the time of Glanville, it was to be a third of such land only as the husband had at the time of the espousals.<sup>1</sup> It was ordained, that no widow should be distrained to marry, if she chose to live single; provided she would give security not to marry without the licence and assent of the king, if she held of the crown; nor without the assent of her lord, if she held of a common person: which last provision was in conformity with the spirit of the common law.<sup>2</sup>

These points concerning tenures, and the incidents of landed property, were ascertained by the Great Charter. The remainder of this ancient piece of legislation is taken up in reforming the modes of redress, and regulating the administration of justice.

Nothing more required mitigation than the rigour with which the king's debts were in those times exacted and levied (*a*). This made it necessary to declare,<sup>3</sup> that neither the king nor his bailiffs should seize any land or rent for a debt, so long as the goods and chattels were sufficient, and the debtor was ready to satisfy the demand. Further, the pledges of such a debtor, says the statute, shall not be distrained, so long as the principal is of sufficient ability; they are only to be answerable in his default; and they may, if they please, have the lands and rents of the debtor to reimburse themselves whatever they have paid for him.

Where the king's debtor dies, the king is to be preferred in payment of debts by the executor. If, says the charter, any one that holds of the king a lay fee<sup>4</sup> should die, and the sheriff or bailiff shows the letters patent of the king's summons for a debt due to the king, the sheriff or bailiff may attach and inventory all the goods and chattels of the deceased that are found within the fee, to the value of the debt, by the *view*<sup>5</sup> of lawful men; so that nothing

(*a*) Upon this there was the following in the chapter in the *Mirror*, on the abuses of the law: "It is an abuse that the king's debts lie dormant, and are delayed to be levied by estreats, since the arrears of sheriffs and of others the king's revenues are to be levied without delay upon those who prefer them, if they themselves be not sufficient, and the arrears of the debts of others are to be levied upon their sureties; where the principals are not sufficient to pay the arrears, the amercements are leviable upon the sureties: and so it is of fines and all other the king's debts, whereby it appeareth that no debt ought to be much behind; in so much as some think that none are chargeable with an old debt, if not of value, or by negligence of the king's officers" (c. v. s. 2, art. xxviii.). By the common law the king could have execution of the body, lands, and goods of the debtor, and distrain for rent due to the debtor. The present charter was found defective upon this point; and hence in the *Articuli Super Cartas* it was provided, "The king will not that over great distresses be taken for his debts, and if the debtor can find able and convenient surety, until a day before the day limited to the sheriff, within which time a man may procure remedy or agree to the demand, the distress shall be released in the meantime."

<sup>1</sup> *Vide ante*, 100.

<sup>2</sup> *Ibid.* 117.

<sup>3</sup> Ch. 8.

<sup>4</sup> Ch. 18.

<sup>5</sup> *Per visum legalium hominum.*

may be removed till the king is satisfied; and after that, the residue is to remain to the executors, to perform the will of the deceased: if nothing is due to the king, then all the chattels are to go to the use of the defunct—that is, to his executors or administrators—saving, says the statute, to his wife and children their reasonable parts; the latter part of which provision does not seem to remove any of the difficulties which were before noticed in the text of Glanville upon the subject of testaments.<sup>1</sup>

A very plain rule of the common law was enforced by a declaration,<sup>2</sup> that no man should be distrained to do more service for a knight's fee, or for any freehold, than was properly due. This provision would not have been necessary, unless the remedy by distress had been lately abused, to compel a compliance with unjust demands (a).

The most interesting part of this famous charter, as viewed by a modern reader, are the provisions for a better and more regular administration of justice. The effects of these are seen even in the present shape of our judicial polity, to the formation of which they contributed very considerably.

The first of these regulations ordains, that *communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco*;<sup>3</sup> the sense of which ordinance is, that suits between party and party shall no longer be entertained in the *curia regis* (b) (whose style, during

*Communia placita non sequantur curiam nostram.*

(a) There was no more fertile source of oppression upon the people than wrongful distresses for pretended services or duties, and it is obvious that, as it was a grievance which affected every one who had goods of his own, it was of the most general and practical importance. In the *Mirror* it is said, "It is an abuse that we do not prosecute a tortuous distress by way of felony, and that one cannot attain these *robbers* at the king's suit" (c. v. s. 1, art. 80); and it is said with much relish, "that Alfred hanged Hale because he saved Tristram the sheriff from death, who took to the king's use from another his goods against his will, forasmuch as between any such taking from another against his will and robbery there is no difference. And he hanged Arnold because he saved Borgliff, who robbed the people by colour of distresses, some by extortion of fines, as if between such extortion and wrongful distresses and robbery there were any difference" (c. v. s. 2, art. 17, 18). And again, in the chapter on distresses: "If any be wrongfully distrained, ye are to distinguish whether it be by those who have power to distrain, or by others. And if by others, then be it an appeal of robbery, whereof Harliff gave a notable judgment; and if by those who may distrain, then they ought to deliver their distress by gages and pledges" (*Ib.* c. ii. s. 26). "And if the distrainer lead it away, then the cognizance of it belongs to the king's court, and so there is a remedy by replevin. But for the releasing of such distresses, and the hastening of the remedy, Ranulph de Glanville ordained that sheriffs and hundredors should take sureties to prove the complaints, and should deliver the distresses, and should hear and determine the complaints of tortuous distresses." In the same chapter, it is said that an action accrues to people wrongfully distrained, and thus no one can cover his robbery by distress. It is then laid down that "no man can distrain who is not covenanted so to do by law, or by some special deed, by law, as for *damage feasant*, or for duties (or services), or amercement of damages, &c., or by deed or by grant of any service or annuity with power to distrain for it." The whole shows that this clause in the charter is, as Coke shows, quoting Glanville, only in affirmance of the common law.

(b) This, as already shown, is a mistake. The courts of king's bench and exchequer, so soon as they became stationary, recovered that jurisdiction over common pleas which necessarily belonged to the *curia regis*.

<sup>1</sup> *Vide ante*, 111, 112.

<sup>2</sup> Ch. 10.

<sup>3</sup> Ch. 11. *Vide ante*, 57.

this reign, was properly *placita quæ sequuntur regem*), which always followed his person (a), and might be held in several differ-

(a) The reasons have already been given for believing that there were no *curia regis*, in the sense of a regular judicial tribunal, except it was the exchequer, which, as appears from the *Mirror*, originally instituted as an office of revenue, had begun to receive suits between party and party. The *Mirror* says in a passage evidently of great antiquity, "The exchequer was ordained in this way for the pecuniary penalties of baronies and earldoms, and the amercements were 'affeered' by the barons of the exchequer, and the escheats sent into the exchequer, though amerced in the king's court" (c. i. s. 3). That might be called the court of a county (c. i. s. 3), which was called *curia regis* in the *Leges Henrici Primi*, or it might be the court of the justices itinerant, or in eyre, mentioned by the *Mirror*. "These writs or commissions (*i. e.*, the king's) were directed sometimes to the justices in eyre, sometimes to persons not named, as to justices and sheriffs" (*Ibid.*). Then, in a subsequent portion of the book—of a later period—mention is made of jurisdiction of judges. "The king, by reason of his dignity, maketh his justices, and appointeth their jurisdiction, and that in divers manners; sometimes certain, as in commissions of assize: sometimes uncertain generally, as in commissions of justices in eyre, and of the chief justices of pleas before the king; and of jurisdiction of the bench, to whom jurisdiction is given to hear and determine fines, the grand assizes, the transaction of pleas, and the rights of the king. Besides, the barons of the exchequer have jurisdiction over revenues and the king's bailiffs, and of rights belonging to the king, and the rights of his crown" (*Ibid.*, s. 3). Sometimes jurisdiction is given to the justices of the bench by removing the pleas out of the counties before the said justices, and sometimes to record pleas holden in mean courts without writs before the said justices of the bench. To the office of chief justice it belongs to redress the tortious judgments and the usage and errors of other justices, and by writ to cause to come before the king the proceedings, in which writs mention is made, "before the king himself" (the style of the king's bench at this day), and the writs not returnable before the king (*i. e.*, in the king's bench) are returnable in chancery (*Ibid.*, s. 3). Thus, therefore, we find mention made of justices in eyre (*i. e.*, who went circuit), and the courts of king's bench, of common pleas, and of exchequer. But this part of the book is certainly as late as the reign of Edward I., as mention is made of the great charter. No mention is made of a court called *curia regis*, but it is clear that, since the Conquest, there had been a great court of the king, which had branched out into three courts, common bench, king's bench, and exchequer, and it appears probable that the primitive court was the exchequer. That there was a *curia regis* in the reign of John, there can be no doubt. Thus, in the 2d John, there is an entry of a fine for a writ of summons, "*coram rege vel coram justitiariis de banco*" at Westminster (*Rot. de Oblatis*, 95), and the *Abbreviatio Placitorum* contains a great number of common pleas of that reign taken in the *curia regis*. That court is described by various terms—"Justitiis domini regis de Westmonasteriis," or "Justitiis de banco." And so in the reign of Henry, prior to the charter, though after the charter the court is called *curia regis*. There is, however, nothing to show that this court was not the exchequer, and a great deal to show that it was. In "Madox's Exchequer," instances are given of common pleas in that court during the reign of John (*Mad. Ec.* i. 117), and there is an entry in the rolls of that reign of a writ addressed, "*Baronibus de Scaccario a curia regis*." Lord Hale cites a case of a fine levied in the reign of John, "*coram ipso rege*;" but that leaves the question open, as does another case he cites from the *Abbreviatio*, in which it was held that a suit was held before the king if it was held before his justices in banc (*Hale's Hist. Com. Law*, p. 151.) The court here alluded to may have been the exchequer, which was pre-eminently *curia regis*, and in point of fact there are records of fines even as far back as Henry II., "in curia Domini Regis apud Westmonasterium ad Scaccarium," and this also Mr Foss states, is an entry constantly to be found in the two reigns following Henry II. Blackstone was of opinion that there was only one court during the Saxon times. After the Conquest, there is no mention of more than one, as in the *Leges Henrici Primi*, in which there is mention made of *curia regis*. There is positive proof that there was a court of exchequer as far back as the reign of Henry II., and no proof of any other, and there is positive proof that common pleas were taken in that court. On the whole, therefore, it is plain that there was no court of common pleas before the Charter, though there was a court for common pleas. That court followed the king, as the exchequer naturally would, and from that and the other reasons there is

ent places in the space of one year, to the great inconvenience of suitors, jurors, witnesses, and others; but shall be debated in some certain stationary court, where persons concerned may resort at all times for prosecuting and defending their suits (*a*).

The operation of this provision must have had an immediate influence upon the two great courts of the king; namely, that held before himself, and that which, though a part of it, was called the exchequer; for as both these attended the king wherever he resided, all suits there between parties were interdicted by the words of this law; and the former remained a tribunal for discussion of criminal matters only; the latter for the cognizance of causes concerning the revenue; while common pleas, as they were to be held in some certain place, seemed, naturally enough, to devolve upon the *bench*, or *justitiarum de banco*, which had been lately established at Westminster, in aid of the two former courts, as we have before seen (*b*). From this period, the bench, or, as the return was, *coram justitiariis nostris apud Westmonasterium* (to distinguish it from the

strong reason to believe that the court was the exchequer. (*Vide Mem. in Scacc.*, fol. 7, end of Y.-B. Edw. II.). The effect of this clause was, that common pleas could not be taken in that court so long as it remained ambulatory, and therefore a fixed court of common pleas was established, as the exchequer continued ambulatory for some time after the Charter. And so of the king's bench. But there is nothing in the Charter to prevent common pleas being held in the exchequer or king's bench when they ceased to be ambulatory, and therefore the notion entertained by the author, and so many others, that those courts, by reason of the Charter, lost their jurisdiction over common pleas, and had to resort to fictions to regain it, arose out of a complete misconception of the terms of the Charter.

(*a*) Upon this the comment in the *Mirror* is, "It is to be interpreted in this manner, that the people shall not travel to sue in the king's household in the counties as they used to do, but this willett that the plaintiffs have commissions to sheriffs, to lords of manors, and to justices assigned (*i. e.*, to hold pleas or assizes in the country), so that right be done to the parties in *certain places* where the parties and jurors may be the less travelled." It is added, "Although it be that the Charter command that petit assizes be taken in their counties, being made for the ease of jurors, yet it is desired, inasmuch as the justices make the jurors come from the furthest borders of the counties, whereas it were better that the justices rode from hundred to hundred than that the people so travel" (*c. v. s. 2*). The object was, that the suitor might, at all events in the legal terms, always have a fixed and settled court to resort to, though of course he could also take his cause into the county when the assizes were held there, though in those times they were held with great uncertainty. And that travelling in those times was a serious affair appears even so long after as the *Paston Letters*, *temp.* Henry VI., where *non venni des Justices* is mentioned as a common reason for not holding an assize (*vol. i. l. 6*).

(*b*) Lord Coke, Hale, and Madox were of opinion with the author that there was a court of common pleas before the charter; and it is clearly implied in the terms of the charter, that common pleas were determined in some court which followed the king. But it by no means follows that this was a court peculiarly for common pleas, and the contrary rather appears from the Charter itself as well as from history. For why did the court in which the common pleas were determined follow the king? Because it was a court in nature attached to his person, which would be true of the court of the marshal of the household, the origin of the king's bench (alluded to in the *Mirror* in the passage cited in the previous note to the present clause) or the exchequer. The reasons have been already offered for believing that the exchequer was the original court, one reason being that, with rapacious sovereigns, the revenue was the matter they would first look to, and another and still stronger is the simple fact, that before Magna Charta common pleas were heard in the exchequer.—*Vide Memoranda in Scaccario*, at end of Y.-B. Edw. II., fol. 7.



king's court, which sat at the Tower, and removed with his person), grew into more consideration; and in after times, as it became the sole and proper jurisdiction for *communia placita*, was thence denominated *the common pleas*. In what manner the other two courts recovered a sort of cognizance in common suits between parties, by means of different fictions, will be seen hereafter.

It was endeavoured to render the proceeding by assize still more expeditious, by ordaining justices to go a circuit once every year to take assizes, instead of waiting till the justices itinerant came; which latter were perhaps not very regular, or, at least, not wished by the great barons to be very regular in their circuit, as they exercised a jurisdiction of a magnitude and extent that controlled the franchises of lords who had inferior courts. The statute<sup>1</sup> directs, that assizes of *novel disseisin* and of *mort-auncestor* shall not be taken but in their shires; whereas we have seen, that writs of assize and mort-auncestor were returnable in Glanville's time, *coram me vel justitiis meis*,<sup>2</sup> in the *curia regis*, or court before the king; but this was now altered, and they were for the future to be taken in the following manner. The king, or in his absence out of the realm, the chief justiciar, was to send justices into every county once a year; and these, together with the knights of the county, were to take the assizes there.<sup>3</sup> Such matters as the justices could not determine on the spot, were to be finished in some other part of the circuit; and such as, on account of their difficulty, they could not determine at all, were to be adjourned before the justices of the bench, and there decided (*a*). This is said to be the first appointment of *justices of assize*; in consequence of which these writs were ever after made returnable *coram justitiariis nostris ad assisas, cum in partes illas venerint, &c.* Assizes de

(*a*) This expression, says Lord Coke, is to be taken largely and beneficially: for they may not only make adjournment before the same justices on their circuit, but also to Westminster or Sergeants' Inn, or to any place out of the circuit (2 *Inst.*). This course affords a curious instance of the way in which valuable enactments were extended by construction. And in Lord Coke's time, as any one who has studied his Reports will be aware, it was the constant practice of the judges in court to reserve cases till they came to town, reserving the judgment. Indeed, the practice appears in some degree to have been kept up to the last century, as Leach's *Crown Cases Reserved* will show. But it appears to have been considered then, not as a legal reservation, but only after judgment, and for the purpose of a recommendation to the crown, in case a point should be resolved for the prisoner, sentence being already passed: This rendered necessary the act for Reservation of Crown Cases (11 and 12 Vict.), which thus, after the lapse of centuries, only carried out Magna Charta.

<sup>1</sup> Ch. 12.

<sup>2</sup> *Vide ante*, 178-190.

<sup>3</sup> By the charter of John, the knights associated with the justices were to be four, chosen by the county; and the assizes were to be taken on the day, and at the place of the county court. This delegation of four by the county reminds us of the ancient practice, when judgments were given *per omnes comitatûs probos homines*.\* The later practice seemed to have been considered as the representative of such ancient tribunal; for in the *Capitula Baronum* they stipulated, that none else (except the jurors and parties) should be summoned to the taking of such assize.† This is probably the origin of the present association in the commission of assize.

\* *Vide ante*, 84.

† *Vide* Black. Chart. vol. ii., Cap. Bar. 8.



*ultima præsentione*,<sup>1</sup> which hitherto had been taken in the king's courts, that is *coram me vel justitiis meis*, were, for the future, to be heard before the justices of the bench only, and there finally determined; a provision which may be thought to be founded in abundant caution, when it had been before declared, that common pleas, of which this was certainly one, should not follow the king's court.

While order was taken for ascertaining and governing the king's courts, some attention was given to the jurisdiction of the sheriff, where matters of less moment were agitated with some solemnity. The county court was to be held<sup>2</sup> only from month to month, that is, not more frequent than once a month; and in counties where the interval of its sitting had been greater, that was still to continue. The sheriff or his bailiff was not to hold his tourn in the hundred more than twice a year, namely, after Easter and Michaelmas, and that in the usual and accustomed place; and the view of frankpledge was to be held by the sheriff at Michaelmas. This last provision was in order to keep up the old constitution so admirably contrived for preserving the peace, and the due order of the decennaries. It was enjoined, that all men's liberties should be maintained as in the reign of Henry II.; and that the sheriff should take no more for his frankpledge than was allowed in that reign. It is cautioned, in this same chapter, that the sheriff should seek no occasion or pretence either for holding his court oftener than is there directed, or taking any unreasonable fees. These injunctions about the sheriff's court were dictated probably by the jealousy that lords of franchises entertained concerning their own courts, with which the sheriff too much interfered.

The practice of courts was considered, and the usage of the common law in some instances was adjusted and confirmed. *Amercements.* It was endeavoured, by declaring the law more fully on that subject, to prevent all abuse of the *misericordia*, or amercement, which we have had such frequent occasion to mention (a).

(a) The word "amercement" is derived from the French, "*à merci*," and signifies the pecuniary mulct laid on a person who has offended against the prerogative of the sovereign, and therefore lies at his mercy. From the nature of the thing, and the derivation of the term, being so arbitrary in its character, and French in its etymology, there is reason to believe that it came in after the Conquest, and was an abuse. That the Norman sovereigns were extremely anxious to create the offence of contempt for the prerogative, for which this was supposed to be the penalty, and to take advantage of it, appears plainly from the charter and the laws of Henry I. In his charter he recites, that amercements against those who were "in mercy," had been unmerciful; and this, although the laws of William the Conqueror contain specific provisions as to penalties for various ranks of people—the highest being six Saxon pounds. The charter of Henry ran thus:—"Si quis baronum vel hominum meorum forisfecerit non dabit vadem in misericordia totius pecuniæ suæ sicut faciebat tempore patris mei et fratris mei, sed secundum modum forisfacti ita emendabit sicut emendasset retro a tempore patris mei et fratris mei in tempore aliorum antecessorum meorum." That is, as it had been in the times before the Conquest, when fines and penalties were reasonable, whereas, under the Conqueror and his successors, they were arbitrary. Thus Henry II., on an occasion of a pretended contempt by Archbishop Becket, although the archbishop sent four knights to excuse

<sup>1</sup> Ch. 13.<sup>2</sup> Ch. 35.

A freeman, says the statute,<sup>1</sup> shall not be amerced for a small default but after the manner of the default; and for a greater in proportion thereto, saving to him, in the language of Glanville, his *contenement*, or *countenance*(a) : with respect to a merchant, saving

his non-appearance, declared all his possessions forfeited, by way of an amercement, although, by the law of William, the fine could not have been above forty shillings. So the *Mirror* says :—"It is an abuse to assess amercements without the afferment of freemen chosen to it, or to assess them in the absence of those who are to be amerced;" and, again, "it is an abuse to amerce a man by default in an action for out-lawry, as loss of land is sufficient punishment" (c. v. s. 1). The Norman sovereigns eagerly availed themselves of any pretence or occasion for declaring a man to be in their mercy, so that he might be amerced *without* mercy; and they thus sought to attach this penalty to any fault or default, or any offence, civil or criminal. Thus, the laws of Henry I. contained a chapter carefully providing what offences should be deemed to be a *misericordia regis*, and various enactments as to fines for defaults in civil proceedings. Yet, in the *Mirror* it is said, that in defaults in actions the consequence of default was, that there was judgment against the party, or that his lands were seized, until *satisfaction was made*—that is, to the amount of the debt or claim; and this, it is said, was the law until the time of Henry III., and nothing is said as to amercements; whence it is that, in a subsequent passage, no doubt written at a later period, it is said to have been an abuse to amerce those who were sufficiently punished by loss of land. There were, however, cases in which amercements were lawful if reasonable, and the object of the Charter was to secure that this should be so. There is a full exposition of the subject in the *Mirror*, in a chapter on amercements, which affords a further comment on this article. A pecuniary pain is called an amercement, which follows real or mixed offences, and is sometimes certain and sometimes uncertain. An amercement is certain sometimes, according to the dignity of the person, as it is of earls and barons, and then the terms of the article as to the *reliefs* of earls and barons, fixed at certain sums by another article, are quoted as if affording the measure of their amercements; and sometimes by a certain *assize* in another place, as of escapes of people imprisoned, in which ye are to distinguish of the place, whether the king's prison or another; and the cause, whether mortal or venial; and if mortal, then whether adjudged or not; and if not, the keeper was not assenting to the escape, then the assize of punishment is so many shillings, or more, according to the usage of the country, or of the place or person. Common amercements are taxable by the oath and afferments of the peers ( *pares*) of those who fail in *misericordia*, according to the constitution of the charter of freedom (i.e., the Great Charter), which willeth that a freeman be assessed, when he falleth into an amercement, according to the quality of his offence—a merchant saving to him his merchandise, and a villein his villenage; and these afferors are to be chosen by the assent of the parties, if they will; but the king's officers are to be more grievously amerced for the breach of their duty. Many cases there are where corporal punishments are bought off by fines of money; and such are called ransoms, or redemption from personal pains, whereof some fines are common, as for murders; others for personal trespasses of towns and commonalties; which fines king Edward ordained should be assessed in the presence of the justices. (See the *Mirror*, c. iv. s. 25, 26). From this it appears that, so late as the time of the charters, the Saxon law as to compositions for felonies, even in cases of murder, still remained. The comment in the *Mirror* upon this clause of the Charter is :—"The point of amercements is measured by justices, sheriffs, bailiffs, stewards, and others, who amerce the people in certain in this manner :—Putting such a one to so much for a contempt or other trespass, without a personal trespass, and without the afferment of the people sworn to it, and without specifying the manner and the quality of the contempt. Again, where afferors ought to be chosen with the assent of those who are amerced, and in a common place, the lords make the afferors to come to their houses to offer the amercements according to their pleasure" (c. v. s. 2). In other chapters, and from Bracton, it appears that the amercements were assessed by the king's justices in their *itineras*, or, as regards those who held of the king, in the exchequer.

(a) Daines Barrington, in his *Observations upon the Statutes*, shows, by several curious quotations, that the word was formerly used as synonymous with entertainment, and that, therefore, this means that a man shall not be so fined, but that he

to him, in like manner, his merchandise; and to a villein, except he was the king's villein, his wainage (*a*): from which provisions it appears to have been the intention, that these amercements should not be the complete ruin of a man. For the same reason also it was declared, that none of the said amercements should be assessed but by the oaths of honest and lawful men of the vicinage (*b*). Earls and barons, however, were not to be amerced but by their peers (which was done either by the barons of the exchequer, or in the court *coram rege*, in both which the *pares regni* were constitutionally judges,<sup>1</sup> and according to their default;<sup>2</sup> nor was a clerk to be amerced in proportion to his spiritual benefice, but after his lay-tenement, and, in like manner, only according to his default.<sup>3</sup> All these provisions<sup>4</sup> were only to affirm and

may be able to give his neighbours good entertainment. Lord Coke says, the countenance of a soldier is his armour; the books of a scholar are his countenance; and the like. The meaning is, that by which a man subsists, or which is essential to his maintenance, as, in the instance of a husbandman, his waggon or wain. The sense is illustrated by the rule of the common law, which exempts working tools, &c., from a distress.

(*a*) The charter here speaks of villeins, and not merely tenants in villenage, who might be freemen (as the *Mirror* points out), because freemen might hold lands in villenage, and they were already provided for by the previous part of the clause; on the other hand, this clause shows that the villeins—as the *Mirror* also points out in a passage already quoted, *supra*—were not slaves; for if so, they could have nothing of their own. “Of villeins mention is made in the great Charter of liberties, where it is said that a villein be not so grievously amerced that his tillage be not secured to him; but the statute maketh no mention of slaves, because they have nothing of their own to lose” (c. ii. s. 128). The *Mirror*, it will be observed, quotes the Charter as speaking of the “tillage” of the villeins, whereas the term used is his “wainagium,” i.e., wain or waggon. But that was his *means* of tillage or service, and the effect is the same. Lord Coke says that “wainagium” signifieth a cart or wain, wherewith a villein was to render his service, or to convey the manure of the lord out of the gate of the manor into the great lord's lands, and casting it upon the same and the like (according to Littleton's definition of villeins' tenure, as something vile and base, such as conveying manure). “And it was great reason to save his wainage, for otherwise the wretched creature was to carry it on his back” (2 *Inst.*). But there is here the confusion so often made between villeins and slaves, and the contemporary exposition of the *Mirror* shows that Lord Coke took much too mean a view of the class here alluded to, and the clause in the quotation. In the *Mirror* it is said that all villeins were not slaves, but were “regardant,” that is, attached to the manor, and thus are distinguished from slaves, of whom it is said that they could purchase nothing but for their lord's use, and that they may not fly from their lords *so long as their lords find them wherewith to live* (c. ii. s. 28). And elsewhere it is said that it was an abuse to hold villeins as slaves (c. v. s. 1, art. 93); or to say that a villein and a slave are all one (*Ibid.*, art. 72). It is manifest that the condition of the villeins was improving at this time.

(*b*) It may be of interest to point out the manner in which this clause in the charter was practically carried out. Bracton states, in describing the jurisdiction of the itinerant justices as to amercements, that they were to observe this provision of the Great Charter: “De illis qui sunt in misericordia domini Regis, et non sunt amerciati, ad quod videndum qualiter sit quis sit amerciandus. Et secundum quod miles et liber homo non amerciabitur nisi secundum modum delicti, et salvo contentamento suo. Mercator veri non nisi salva merchandisa sua. Et villanus autem non nisi salvo wainagio suo, et hoc per iudicium proborum hominum de visneto, qui affidabunt simul cum serviente” (lib. iii. c. i. p. 117). It is impossible not to see from this how entirely the observance of the Charter depended practically upon the manner in which it was carried out by the judges.

<sup>1</sup> Bract. fol. 116, b.<sup>2</sup> *Delicti*.<sup>3</sup> *Ibid.*<sup>4</sup> *Vide ante*, p. 157 (note.)

give a sanction to ancient usages, some of which have been before mentioned: upon this chapter, however, was afterwards framed the writ *de moderatâ misericordiâ*, for giving remedy to a party who was excessively amerced.

The form of trial was intended to be adjusted by the following regulation, though the precise meaning of it has occasioned some doubt (a); *Nullus ballivus de cetero ponat aliquem ad legem manifestam, nec ad juramentum simpliciter loquelâ suâ, sine testibus fidelibus ad hoc inductis*.<sup>1</sup> Whether this means, that the defendant should not discharge himself by his own oath alone, without the oaths of other persons swearing to their belief of his assertion; or, that no defendant should be put to wage his law, unless the plaintiff supported his *loquela*, or declaration, by credible witnesses; or, as they were afterwards called, *sectatores*; has been a question with some writers. Several passages in Bracton seem to favour the latter opinion; and Fleta explicitly declares this to be the meaning of the provision;<sup>2</sup> if so, most probably the practice of bringing into court the *sectatores* of the plaintiff, was established by this clause.<sup>3</sup> The defendant making his law by the oaths of others swearing with him, was an old usage,<sup>4</sup> in criminal cases at least, and as such is mentioned by Glanville; but it is not spoken of at all by that writer as a mode of proof for a defendant in civil suits; though we shall have occasion to mention it frequently in that light upon the authority of Bracton. From the manner in which the latter author speaks of a defence *per legem*, it seems to have been long in use; and from this passage in *Magna Charta*, we must conclude that it had been adopted from criminal to civil actions shortly after the time of Glanville. The *sectatores*, in this sense, constitute another novelty, of which there is no mention in Glanville. When it had become the practice to admit *sectatores*, for so they also were called, to make the defence, it appeared reasonable enough to require, as *Magna Charta* here does, that certain persons should, in like manner, be brought to make out the plaintiff's case. It may be conjectured from the name, that both these sets of persons were originally chosen from the *sectatores* or suitors of court, who were

(a) It is explained thus in the *Mirror*: "The point which forbiddeth that no bailiff put a freeman to his oath without suit, is to be understood in this manner, that no justice, no minister of the king, nor other officer nor bailiff have power to make a freeman make oath without the king's command, nor receive any plaint without witnesses present, who testify the plaint to be true." Before a man could be put to his law or his oath, which meant the same thing (wager or gager of law being the proceeding by which a defendant waged or gaged, i.e., pledged his oath), the accuser had to produce his *secta*, or suit of followers or witnesses, a practice which became obsolete in the time of Edward III., when the names of John Doe and Richard Roe, as a mere form, make their appearance. Wager of law was a relic of the old Saxon practice of "compurgators," and so Coke said there were to be eleven besides the defendant, because the wager of law was "to counter-vail a jury." But the plaintiff was bound to have his witnesses present, and so in the *Mirror* it is said, "It is an abuse that any plaint is received to be heard without sureties present to testify the plaint to be true" (c. v. s. 1).

<sup>1</sup> Ch. 28.<sup>2</sup> Flet. 137.<sup>3</sup> *Vide ante*, 85, in the note.<sup>4</sup> *Ibid.* 195-198.

there present, ready to transact such business of the court as might arise.

Of all the provisions made by this Charter for the security of the person and property of the subject, none has so much engaged the attention and claimed the reverence of posterity as chap. 29, which contains a very plain and explicit declaration as to the protection every man might expect from the laws of his country (a). *Nullus liber homo capiatur (b) vel imprisone-*

(a) The comment of the *Mirror* upon this is remarkable. "The point where the king granteth that he will not desseisin, nor imprison, nor destroy, but by lawful judgment, *which overthroweth the statutes of merchants and other statutes*, is to be interpreted thus, that none be arrested, if not by warrant granted, upon a personal action ; for if the action be venial, no imprisonment is justifiable, if not for default of mainpernors. *And so it appeareth that none is imprisonable for debt.* And if any statute be made repugnant to this point, either for the king's debt or for the debt of any other, *it is not to be kept.* That none be outlawed is to be meant, if not for mortal felony, from which one is saved by the oath of neighbours, *ex officio*, as it is the usage in eyres, and therefore that destroyeth the statutes of outlawry of a man for arrearages of account, and all other like statutes. And that in which it is said that none be exiled or destroyed, is to be interpreted in this manner, that every one have an action to appeal, all persons, all suitors, all assessors, who destroy men against the right course and against the rules of law. On the other part, where the king forbiddeth that none be disseised of his freehold, and it is thus to be understood that one shall recover by assize of novel disseisin every manner of freehold and all manner of possessions, rents of land, or of franchises, whereout one is cast, if it be not by lawful judgment ; and these words, 'if it be not by lawful judgment' refer to all the words of this statute" (*Mirror*, c. v. s. 2). Now, from this remarkable exposition it appears that the words in the clause, *vel per legem terræ*, were understood to mean, in any way, by due course of law, as by legal warrant, and the like, and that the notion was that every subsequent statute, repugnant to the Charter, as the statutes allowing imprisonment for debt, was unlawful, in a sense which no one now-a-days would uphold, the maxim being that *leges posteriores, leyes priores, contrarias abrogant*. The idea, however, in those days obviously was (one which has obtained often in later times) that the Charter was more than a mere ordinary statute ; that it was, so to speak, the rule of constitutional law, so that no statute at variance with it would be constitutional. And it is very observable how extremely practical is the view taken by the commentator, who evidently regarded the Charter with reference to its practical bearing upon the great body of the people in the common affairs of life, and not at all with reference to those political considerations which are usually associated with it. All the commentators think about it is, how it will affect the people in their daily obligations and transactions, as, for instance, with reference to arrest for debt, and the like. It would probably never occur to any one in these days to connect the Great Charter with such a subject at all. Imprisonment for debt has so long been legal, that it never would present itself to us now as coming within the scope of a charter which we usually imagine to have been obtained as a check upon the arbitrary power of the crown, and which, doubtless, was obtained chiefly with that view. But it is evident that, though the crown was the great oppressor of the barons, the people had other oppressors than the officers of the crown, and had other views altogether of the effect or object of the Great Charter, and their views of it were not so enthusiastic as those of its modern admirers.

(b) Upon this the *Mirror* observes, "There lieth no recovery of damages by the assize of novel disseisin ;" that is, that though a freeman were disseised or dispossessed of any of his rights or liberties, there was only a remedy in *restitution*, not recovery of full damages as compensation, as to which again there was a subsequent statute, the statute of Merton, and the statute of Gloucester, 16 Edward I. It will be observed in the comments of the *Mirror* upon both these clauses of the first article of the charter how exceedingly practical the commentator is. Of what avail (he seems to say) these admirable general provisions, *if they are not enforced* ? And how are they to be enforced ? That was indeed the great difficulty of the age ; and, as Guizot points out, it was only solved by civil war, until law was made supreme.

*tur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destructur. Nec (a) super eum ibimus (says the statute in the name of the king), nec super eum mittemus (b), nisi per legale iudicium parium suorum vel, per legem terre (c);* “nor will we take possession of his effects, but by ‘the judgment of his peers’” (which as in another chapter, had in view the *comites et barones*, and not the trial by jury, as has been commonly but erroneously supposed), “or by some other legal process or proceeding adapted by law to the nature of the case.” The statute goes on and says, *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam;*

(a) The article means, in fact, that the king will not make war upon his subject when he can resort to ordinary law. It must not, however, be supposed that this article had anything to do with the rights of war; and it must be borne in mind that rebellion is war against the crown, whence it is that it is called, in the law, levying war against the crown. When rebellion has put a stop to the ordinary course of justice, that is to say, is too strong for the ordinary force by which justice is executed, there is a state of war, in which, by the terms of the Charter itself, war is an implied exception to it, and justifies measures of war on the part of the crown against the rebels. For the terms of the article are, that a man shall not be destroyed, save by the law of the land, the ordinary law of the land, which supposes and implies that *it can be put in force*; for, if not, the article would work an absurdity, and legalise anarchy. This was well understood at the time when the Charter was granted. The year after the charter of Henry III. was granted, a knight with an armed force seized the king’s judges and imprisoned them in his castle, where he bade defiance to the ordinary power of the law. The king levied an armed force, laid siege to the castle, and, when he had taken it, hanged those who were in it, and had defended it against him. No one in that age appears to have considered that this was illegal, as coming within the real spirit and meaning of this clause in Magna Charta. For it would have been idle to attempt to apply the ordinary forms of law against a man who had fortified himself against and bade defiance to its power, and could only be subdued by actual war. (See the contemporary chronicles).

(b) The author here has this note:—

Lord Coke conceives *ibimus* to signify the process of the court, *coram rege*, and *mittimus* that of any court which derives its authority from a writ sent to it. But these words have a technical sense in the civil law, which fully and more simply explains their meaning here. *Ire bona alicujus dicuntur, qui in rerum possessionem a magistratu mittuntur* (*Calc. Lex. Jur. Irc.*) As the former expressions in this chapter apply to the person and the freehold, it seemed natural to add such as would protect the goods and chattels. The trial by jury was never spoken of in these days as *iudicium*, much less *iudicium parium*. We hear of *verdictum*, *juramentum legalium hominum*, *jurata vicini*, and the like, all expressive of some sworn truth, or of the person who swore it coming from the vicinage. Whereas the *pares regni* gave judgment, and not upon oath; so did the *sectatores*, in the county and other courts, who were the *pares* to all *liberi homines de comitatu*; and these latter came from the body of the county, and not from the vicinage.\*

Dr Lingard has suggested a much better illustration of the passage, and one singularly happy. King John, by a patent issued before his charter, engaged not to take or dispossess the barons. “*Nec super eos per vim vel per arma, ibimus*,” that is to say, says Dr Lingard, “he had been in the habit of going with an armed force or sending an armed force on the lands or against the castles of them he knew or believed to be his enemies, without observing any form of law” (*History of England*, vol. ii. c. 14). (See also Brady’s *History of England*, vol. ii. p. 501). And numerous actual illustrations of this may be afforded, both before and after the Charter. Thus John, after the first charter, seized a castle belonging to one of the barons, who had assisted in obtaining it; which was illegal, because the baron was lawfully holding his own in time of peace. It was otherwise in the case above mentioned, note (a).

(c) That is, as regards the barons in pleas of the crown, in which they had privilege of peerage, their fellow barons; but as regarded civil matters, common pleas be-

\* *Vide ante*, 84, 85.

whereby the king in his own person declares, that he will neither sell, deny, or delay to any man a due administration of the law(a).

tween subject and subject, the general body of the freeholders were all " *pares* ," and they could try, as jurors, any such pleas, whether the justices were barons or not. Indeed, apart from that privilege of peerage, which applied as against the crown, every freeholder was a baron, and, in early times, was so called; and hence the distinction between greater barons and lesser, or knights, as they were called in the age of the Charter. Hence, at this day, the phrase, the knights of the shire. In civil cases, therefore, this really meant trial by jury, and so in criminal cases as regards all but barons. Hence, in the comment upon the clause in the *Mirror*, it is said, the only remedy, if a man were disseised, was an assize of novel disseisin, in which there was trial by jurors. Hence also in another chapter on cases of disseisin, the trial by jurors is described, as to which, however, it is to be observed, that the jurors were still witnesses, and hence trial by jury was not as it afterwards became, a trial by evidence. Therefore if the jurors knew nothing they could say nothing. Hence in the chapter just referred to it is said: "If the jurors in petit assizes are agreed that one shall give their common verdict for all, and they say they know nothing, the plaintiff shall receive nothing, because he proved not his action; and if they be of divers opinions, they are not, therefore, to be threatened or imprisoned, but are to be secured, and diligently examined. And if two jurors be found to agree among all of them, it sufficeth for him for whom they speak." And it is added, that they are only to be examined as to the point of the action (c. ii. s. 24); likewise it appears that if two of the jury of their own knowledge could speak for the plaintiff, that was sufficient to warrant a verdict for him, provided that then none of the others of their own knowledge would speak against him. This appears also from another passage in the *Mirror*, in which it is said "it is an abuse to compel jurors, witnesses, to say that which they know not, by distress of fine and imprisonment, after their verdict, when they could not say anything; and it is an abuse to examine not the jurors though they found at least two to agree" (c. v. s. 1); whence again it appears that if two agreed, it might be sufficient, although the jury were to be examined, to see upon what they were agreed, and whether it went to the point of the action. It is quite obvious that at the time of the Charter trials were by juries, and that in civil cases all freemen were equals, and the doctrine that a baron could only be tried by his peers, did not apply, for that only applied, as privilege of parliament, to parliamentary peers, or the greater barons, and it applied only to pleas of the crown. It has been seen, under the reign of William, that suits were brought by peers in the county court. The author therefore was in error in what follows.

(a) Here again the comment of the *Mirror* is singularly practical, and gives quite a different idea of the Charter from that to which we are accustomed. "The point which the king grants to the people, that he will sell no right, nor hurt nor delay justice, is misused by the chancellor, who sells the remedial writs, and calls them writs of grace; and by the chancellor of the exchequer, who denieth acquittances of payments made to the king under 'green wax,' and all those who delay right judgment or other right" (*Mirror*, c. v. s. 2). As regards the first part, also, the *Mirror* elsewhere says, "It is an abuse that the king's officers of the exchequer have jurisdiction of other things than the king's moneys, or fees, or franchises, without an original writ out of the chancery under the white wax" (*Ibid.* s. 1, art. 27). And again, "It is an abuse that the remedial writs are saleable, and that the king commands his sheriffs that he take sureties to his use for the writ; for by the purchase of these writs he may destroy his enemy wrongfully" (*ibid.* art. 18). And then elsewhere it is said, speaking of Alfred's time, "In his time, every plaintiff might have a commission and writ to his sheriff, or to the lord of the fee, or to certain justices assigned upon every wrong which was done." "In his time there was no stay of writs; all remediable writs were grantable as of right (*i.e.*, *ex debito justitiæ*), by virtue of an oath" (*Ibid.* c. v.; *Abuses of the Law*, *ibid.*, art. 108). Now, from this it is plain that in the times of the charters it was deemed an abuse that fees should be taken for any writs, and that this was in fact an infraction of the Charter in the point here noticed. It is said in an earlier portion of the work, "It was ordained (*i.e.*, in past times), that the king's courts should be open to all plaints, by which they had original writs without delay, as well against the king as against the people, *i.e.*, writs of prohibition or the like directed to officers of the crown, to prevent or restrain their proceedings. The complaint of the commentator is twofold, that all writs are not *ex debito justitiæ* (as writs



Among the regulations for the administration of justice, must be mentioned that respecting the writ of *præcipe in capite*; *Præcipe in breve quod dicitur*, says the Charter, *Præcipe in capite in capite. de cætero non fiat alicui de aliqua libero tenemento, unde liber homo perdot curiam suam* (a). We have seen, that, in Glanville's time,<sup>1</sup> the regular way was, that for land held of a private lord suits should be commenced in the lord's court, and that only writs concerning land held *in capite* should be returnable in the king's court. The course seems to have been sometimes not adhered to, and a writ of *Præcipe* for lands held of a private lord used to be brought sometimes in the *curia regis*, as if the land was held *in capite*. It was to prevent this prejudice to the lord's court, that the above provision was made; and since that, all writs of right of land held of any other than the king, have been invariably brought in the lord's court, though they might afterwards be removed by *pone*.

of summons are), and that all writs were paid for, which is at this moment the case. In the shrewdness or simplicity of those times they seemed to imagine that the provision in the Charter precluded the exaction of fees in judicial proceedings. But probably it was rather directed against bribes or fines for the expediting of justice. Of this latter many instances are given in *Madox's History of the Exchequer*, ch. xii. Thus we find that in the 3d Henry III. the men of Portsmouth gave two casks of wine for the king to command the itinerant justices to hold pleas of that town, according to their charter; and in the 16th John, a suitor paid a fine of *fox dogs* for a writ to remove his cause into the court of the king. In some cases the parties offered a portion of what they were to recover to the crown; and thus Madox states that in the 1st Henry III. a suitor was fined half of her debt to recover it from her debtor. Fines also for delaying of pleas, judgments, &c., were numerous; and thus the same authority records that in the reign of Henry II. the men of Southwark paid a fine to respite their complaint against the city, and the suitors paid fines for the adjournment of their cases into the exchequer. Thus it should seem that the real scope of the clause was not fees, but fines—that is, not fixed moderate payments for fair purposes of revenue, but arbitrary exactions and extortions, either for the provision or execution of justice. The words, "to none will we sell," were meant to abolish the fines paid for procuring of right; "to none will we deny," meant the stopping of suits or proceedings and the denial of writs; "to none will we delay," meant the delays caused by the counter-fines of defendants (who would sometimes outdo the plaintiffs), or by the will of the prince. The statute, says Madox, so far effected its object that fines for law proceedings became more moderate, and the evils alluded to fell into disuse. But the *Mirror* says, speaking of the time of Edward I., "It is an abuse that justice is delayed in the king's court more than elsewhere" (c. v. s. 1). "And it is an abuse that remedial writs are saleable;"—so that, half a century after the Charter, this clause of it had proved nugatory.

(a) The comment of the *Mirror* is, "The clause, of the *præcipe*, is not holden in that they do it without writs of possession of farms every day, so that the lords lose the cognizance of their fees and the advantage of their courts" (*Mirror*, c. v. s. 2). The word *præcipe* is the initial word in a writ of the king's court, as a writ of right; and Bracton says the clause only refers to writs of right (*Bracton*, fol. 281). The clause seems to have been aimed at the practice of serving writs in the king's court, when the suit should have been brought in the court of the lord of whom the lands were held, whereby he lost the profits. It will be observed that the words are "*præcipe de capite*," which latter words, added in the third chapter of Henry III., implied that the land was held of the king in chief, or otherwise the suit should first be brought in the court of the lord of whom the land was held, and hence Lord Coke suggests that to carry out the clause there ought to have been an oath required of the truth of this recital in the writ. The object was to prevent injuries to the lords under colour of the writ falsely issued.

<sup>1</sup> *Vide ante*, 172.



That this provision was aimed only at writs of right, and not at other *precipes*, is expressly declared by Bracton.<sup>1</sup>

These were the regulations ordained for the settlement and improvement of our law relative to property, and the administration of civil justice. Some few provisions were made regarding our criminal law, though not of the same magnitude with the former.

As the distribution of justice, particularly that which concerns the lives and persons of individuals, should be in the hands of persons not only of discretion and judgment, but also well versed in the law, it was thought proper to ordain,<sup>2</sup> that no sheriff, constable, coroner, or other bailiff of the king, should hold pleas of the crown (*a*): it is held, that<sup>3</sup> by this provision, the authority of the sheriff to hear and determine theft and

(*a*) The comment of the *Mirror* upon this is, "The chapter which forbiddeth sheriffs, coroners, or bailiffs to hold pleas of the crown, seemeth not needful, for appeals of felony are not here to be brought before coroners, and the exigents and judgments pronounced; and, therefore, this point had need to have had more words to have expressed the meaning of it," (*Mirror*, c. v.). This, no doubt, means that the coroner did not *try* criminals as sheriffs did. Our author seems to have supposed that the article did not apply to pleas triable before the sheriff, as though a plea of the crown could not be tried before the sheriff; but the sheriff was the king's criminal judge, and, therefore, Glanville includes theft among pleas of the crown, though, as his book was confined to the *curia regis*, he did not enter further into the practice of the various counties differing in their courts. The object of this clause in the Charter was to secure that men should be tried before regular judges, the king's justices sent down into the counties, who, being men more devoted to the law as a study and profession, were naturally more relied upon. This clause, therefore, marks an era in the history of the law, so far as regards the criminal judicature, as other clauses do with reference to the civil judicature. That many grievous mistakes were made in the administration of criminal justice, through ignorance of the law, in these days, is clear from other passages in the *Mirror*. There, among the "abuses" of the law, mentioned in the chapter under that head, are these:—"It is an abuse that a man who hath done manslaughter of necessity, or with the peace, or not feloniously, is detained and kept in prison until he hath purchased the king's charter of pardon, as (*i.e.*, as it is) for his chance. It is an abuse to hold the movable goods of fugitives from justice, forfeited before they be attained of the felony, by outlawry or otherwise. It is an abuse to outlaw a man before it hath been confirmed by oaths of neighbours. It is an abuse to suffer a man attainted of felony to be an approver, and to have a voice as a true man. It is an abuse that others reverse the appeals of approvers, than coroners, and that they are suffered to appeal oftener than once, or falsely. It is an abuse to bring the appeal elsewhere than before the coroner of the county, and that appeareth by the writ of appeal as a writ grounded upon error," (so that the other passage, the comment on the Charter, seems an error). "It is an abuse to determine the appeals of felony by ordinary judges, suitors," *i.e.*, the freeholders in the county court, where the sheriff sat as judge in crown cases, so that this seems just the evil intended to be remedied by the Charter. "It is an abuse to make a man to answer to the king's suit when he is not indicted or appealed. It is an abuse to imprison any other than a man indicted or appealed, without a special warrant. It is an abuse that justices and their officers who kill people by false judgment, are not destroyed like other murderers, which, it is said, king Alfred caused to be done, who caused forty-four justices, in one year, to be hanged as murderers for their false judgment. It is an abuse that a man be accused of life and murder without suit or indictment. It is an abuse that the justices show not the indictment to those who are indicted, if they require the same. It is an abuse that rape is a mortal offence." It is manifest that there was trial by jury; for it is said, "it is an abuse to compel jurors, witnesses, to say that which they knew not. It is an abuse that one examined the jurors, though they find at least two to agree." It is also said that "it is an abuse to adjudge a man to death, by suitors, if not in cases so known that there need no answer." Yet it is also

<sup>1</sup> Bract. fol. 281.

<sup>2</sup> Ch. 17.

<sup>3</sup> Inst. 32.

other felonies was entirely taken away. But this alteration could not have been made by force of this statute alone; it must be remembered, that, in the time of Glauville, theft was not among the *placita coronæ* (a), but was tried by the sheriff. In the time of Bracton, we find it was reckoned among the *placita coronæ*; and this change of its nature was necessary, before the present clause of *Magna Charta* could have the effect of removing it from the jurisdiction of the sheriff, as a plea of the crown. Whether this new denomination took place before or after the passing of *Magna Charta*, or in what period between the times of Glauville and Bracton, it is not easy or necessary to determine. This provision

said, "it is an abuse that the justices drive a true man to be tried by his country when he preferreth to defend himself against the approver by battle." Whence it appears that trial by jury was not yet thoroughly understood, as we have it, as a trial by evidence, but merely from personal knowledge; so that, if the jurors did not happen to know anything of the case, they were in great perplexity. And the course taken when they were in doubt was, it is evident, to "examine" them and see if they could be brought to agree. This opened a door for influence on the part of the judge, and hence one of the abuses complained of. In another place it is said that in doubtful cases we ought to save rather than to condemn; but a case is put of a judge who in such a case condemned the man. It will be observed, it is said to be an abuse that a man should be judged to death by suitors; now these were the suitors at the county court, where the sheriff sat as criminal judge, and that illustrates the meaning of the above clause in the Charter, and the mischief it was intended to meet. From other parts of the *Mirror* it is apparent that there were grievous mischiefs through ignorance of those who tried criminal cases. Thus, in the chapter on murder, it is said, "ye are to distinguish from other manslaughter, as of jurors, justices, witnesses," &c. "Judges judge men falsely to death wittingly, and sometimes out of ignorance; in the first case they are murderers, and are to be hanged by judgment; and in the second place, ye are to distinguish, for one manner of ignorance excuseth, and another kind that doth not excuse, and note that ignorance itself is no offender. The judge doth not offend so much that he doth not know the law, but in foolishly undertaking upon him to judge foolishly or falsely. And that which is said of justices is to be intended also of jurors, and of witnesses in cases notorious" (c. ii. s. 16). It is to be observed that the sheriffs would come under the general term justices, and indeed, in the time before the Charter, the sheriff often was one of the justices of the king. With respect to the word "constables," it must not be supposed that the ordinary officers of the peace are intended, but the constables of castles, of which there were, in the time of Henry, upwards of a thousand. The whole country was covered with these fortresses, which, as described by the chronicles, were too often "dens of thieves," the owners and their officers being generally plunderers of the people. The castles were always on manors, and Guizot points out how, in the Middle Ages, the "villas" had changed into castles. The lord of manors had criminal and civil jurisdiction within their manors, and hence the constables held trials of pleas of the crown, that is, of criminal charges, within their manors, as the sheriffs did within the counties. And so of the stewards or bailiffs in manors, not castles. These officers were all the more dangerous, because as their fortresses were very secure places, and so convenient for prisons, they often had the keeping of prisoners charged with crimes in the counties. Hence they possessed powers very liable to be abused, and which were abused to purposes of horrible oppression. Hence, long after the Charter, and when, after the justices of the peace were established, these functionaries got themselves put into the commission of the peace, the abuses they committed were thus described in a statute (5 Henry IV. c. 10), by which it was recited that constables of castles by colour of their commissions take people, to whom they bear ill will, and imprison them within their castles, till they have made fine and ransom with the constables for their deliverance. It may be imagined how desirable it was to deprive this class of functionaries of the dangerous power of trying their prisoners; and hence the necessity for the present enactment, one of the most important to the people of any to be found in the Charter.

(a) This is a mistake. It was a plea of the crown, though so tried.

has been construed to apply only to hearing and determining; and therefore it was held, that the sheriff's power to take indictments of felonies and misdemeanours, as well as the coroner's to take appeals, still remained unimpeached; and in truth both were exercised for many years after, till a particular statute<sup>1</sup> was made to abolish the last remains of the criminal jurisdiction belonging to these ancient common-law judges.

It was declared, that a woman should not bring any appeal of death, except of the death of her husband, in the following words:<sup>2</sup> "No one shall be taken or imprisoned on account of the appeal of a woman brought for the death of a man, except for the death of her husband;" which is one, among many other articles of this statute, that is only a confirmation of the common law.<sup>3</sup>

The writ *de odio et atia* was rendered more attainable than it had hitherto been. It was ordained that this writ, *odio et atia*, in future, should issue *gratis*, and should never be denied<sup>4</sup> (a). This is the first mention of this writ by name, though it has been alluded to in a former part of this history.<sup>5</sup> This writ was one of the great securities of personal liberty in those days. It was a rule, that a person committed to custody on a charge of homicide, should not be bailed by any other authority than that of the king's writ; but to relieve a person from the misfortune of lying in prison till the coming of the justices in eyre, this writ used to be directed to the sheriff, commanding him to make *inquisition*, by the oaths of lawful men, whether the party in prison was charged through malice, *utrum rettatus sit odio et atia*; and if it was found that he was accused *odio et atia*, and that he was not guilty, or that he did the fact *se defendendo*, or *per infortunium*, yet the sheriff, by this writ, had no authority to bail him; but the party was then to sue a writ of *tradas in ballium*, directed to the sheriff; whereby he was commanded, that, if the prisoner found twelve good and lawful men of the county who would be mainpernors for him,

(a) Glanville says, that persons accused of murder were not discharged upon pledges (or bail), unless by the king's particular prerogative (lib. xiv. c. 2), which is supposed to allude to this writ. The comment of the *Mirror* upon this clause is, that the provision that it be granted freely, ought to extend to all remedial writs, and that the writ ought to extend, not only to felonies of murder, but to *all* felonies, and not only in appeals, but in indictments (c. v. s. 2); and elsewhere it is said to be an abuse that the writ takes place only in cases of murder; but it is also said that it is an abuse that it lieth for inditees—i.e., after indictment found; and, it is added, that it is an abuse that appellees or inditees of mortal crime are got out of prison by bail; and again, it is said to be an abuse to let to bail a man indicted of a mortal offence by pledges (*Ibid.* 17). The effect of all this appears to be, that the remedy, by *judicial inquiry*, ought to be available in any case, before indictment found, where the charge was found groundless on such inquiry; but that, *without* it, not in *any*; nor after indictment found; and that is, in effect, what the law really is.

<sup>1</sup> 1 Edw. IV., c. 2.

<sup>2</sup> Ch. 34.

<sup>3</sup> Lord Coke, in his Commentary on this chapter, has laid it down that a woman before this statute might have an appeal of the death of any of her ancestors; but this opinion seems to have no foundation, and what has been laid before the reader in another place, shows the law to have been quite otherwise. *Vide ante*, 199, 200. 2 Inst. 68.

<sup>4</sup> Ch. 26.

<sup>5</sup> *Vide ante*, 198.

then he should deliver him in bail to those twelve. The writ, or inquisition *de odio et atia*, had a clause in it, *nisi indictatus vel appellatus fuerit coram justitiariis ultimo itinerantibus*; so that the inquisition was not in such case to be taken.<sup>1</sup> We see how important it was, that this writ should be attainable with as little expense and trouble as possible, to avoid the oppression of malicious prosecutors.

As to the forfeiture and escheat of lands for felony, it was declared, that the king would not hold them for more than a year and a day, and then they should go to the lords of the fee;<sup>2</sup> which was nothing more than the language of the law before.<sup>3</sup>

It was declared, that escuage should be taken<sup>4</sup> as it was wont in the reign of Henry II. This is the last provision of this famous charter; and is followed by some general declarations and renunciations dictated by the solemnity of the occasion. The liberties and free customs belonging to all persons, spiritual or temporal, are saved; and the king declares, that “all the customs and liberties aforesaid, which we have granted to be holden within this our realm, as much as appertaineth to us and our heirs, we shall observe; and all men of this our realm, as well spiritual as temporal, as much as in them is, shall observe the same against all persons in like wise.” For this grant of their liberties, the barons, bishops, knights, freeholders, and other subjects, granted a subsidy; and then, says the king, “we have granted to them, for us and our heirs, that neither we nor our heirs shall attempt to do anything whereby the liberties contained in this charter may be infringed and broken. And if anything should be done by any one contrary thereto, it shall be held of no force or effect” (a).

To these solemn and repeated declarations respecting the sanctity of this charter of liberties, is added *hinc testibus*, containing a list of the greatest names in the kingdom: for as in these times no

(a) It is very remarkable that upon this clause there is no commentary in the *Mirror*, which supports the impression that the writer belonged to the body of the people, and therefore attached more importance to those provisions which appear to relate to them than to those which affected the barons and knights. The history, however, of this clause is extremely interesting, on account of the important bearing of the subject upon the rise of our representative institutions. It has already been seen, in the comments on the charter of Henry II., that “scutage” was an incident of military tenure, and a kind of composition for non-attendance in war. This clause simply provides that it should be assessed at a reasonable amount, as under the charter of Henry II. But the clause in the charter of John contained the important condition, that it should only be imposed by the common council of the realm. This, however, was left out of the present charter; but in the charter of Edward I. it was again inserted, and this was followed by various statutes, which declared that the king should take no talliages, scutages, or aids, but by the consent of the common council of the realm, which, being for this purpose, made representative—in effect created a Parliament. Scutage thus became virtually merged in subsidies, and the last scutage levied was in the reign of Edward II. Thus, as Blackstone observes, the levying of scutage by the consent of the council of the realm became the groundwork of all the fixed taxation of the kingdom—first for subsidies, and then for the land-tax, its modern substitute. And the development of the great principle just asserted as to scutage led to the constitution of our parliament.

<sup>1</sup> Bract. 122, b. 123, a. b.

<sup>2</sup> Ch. 22.

<sup>3</sup> *Vide ante*, 120.

<sup>4</sup> Ch. 37.

grant of franchises, privileges, lands, or inheritances passed from the king but by the advice of his council, expressed under *hiiis testibus*, this was thereby rendered an act of the king, attended with every formality that could possibly render it binding. In this consideration of it, it is properly *charta*, or a charter; though in that form it received likewise the authority of parliament. To the end of the charter, as it stands in the statute-book, is subjoined the confirmation of it before mentioned to have been made in the 25th year of Edward I.

The *Charta de Foresta* is likewise taken from the roll of 25 Edward I. and has a confirmation of that date prefixed Charta de Fo- restâ. to it, similar to that prefixed to *Magna Charta*. This charter, though of infinite importance at the time it was made, contains in it nothing interesting to a modern lawyer, any further than as it gives some specimen of the nature of the institution of Forest Law, and the burthens thereby brought on the subject. In this light, the Charter of the Forest is a curious remain of ancient legislation. It contains sixteen chapters.

The first chapter of this charter directed that all forests which had been afforested by Henry II. should be viewed by good and lawful men; and if it was proved that he had any woods, except the demesne, turned into forest, to the prejudice of the owner's wood, it was to be forthwith disafforested; but the royal woods that had been made forest by that king, were still to remain, with a saving of the common of herbage, and other things which any one was before accustomed to have.<sup>1</sup> This was the provision in relation to the forests made by Henry II. As to those made by the kings Richard and John, they, unless they were in the king's own demesnes, were to be forthwith disafforested.<sup>2</sup> The charter directed, that all archbishops, bishops, abbots, priors, earls, barons, knights, and free tenants, having woods in forests, should have them as they enjoyed them at the first coronation of Henry II., and should be quit of all purprestures, wastes, and assarts, made therein before the second year of Henry III.<sup>3</sup> Thus far were limits fixed to the extent of forests; and after these provisions a clause is added, by which all offences therein were pardoned.

In point of regulation it was ordained, that regarkers, or rangers, should go through the forest to make their regard or range, as was the usage before the first coronation of Henry II.<sup>4</sup> The inquisition, or view for the *lawing* or *expeditation* of dogs, was to be had when the range was made, that is, from three years to three years; and then it was to be done by the view and testimony of lawful men, and not otherwise. A person whose dog was found not *lawed*, was to pay three shillings. No ox was to be taken for *lawing*, as had been before customary; but the old law in this point of expeditation was to be observed, namely, that three claws of the fore-foot should be cut off by the skin: and, after all, this expeditation was

<sup>1</sup> Ch. 1<sup>2</sup> *Ibid.* 3<sup>3</sup> *Ibid.* 4.<sup>4</sup> *Ibid.* 5.

to be performed only in such places where it had been customary before the first coronation of Henry II.<sup>1</sup> It was ordained that no forester, or bedel, should make scotal, or gather gerbe, oats, or any corn<sup>2</sup> whatever, nor any lambs, or pigs; nor make any gathering at all, but upon the view and oath of twelve rangers, when they were making their range. Such a number of foresters was to be assigned, as should be thought necessary for keeping the forest.<sup>3</sup> It was permitted to every freeman to agist his own wood, and to take his pannage within the king's forest; and for that purpose he might freely drive his swine through the king's demesne woods; and if they should lie one night in the forest, it should be no pretence for exacting, on that account, anything from the owner.<sup>4</sup> Besides the above use of their own woods, freemen were permitted to make in their woods, land, or water within the forest, mills, springs, pools, marlpits, dikes, or arable grounds, so as they did not enclose such arable ground, nor cause a nuisance to any of their neighbours: <sup>5</sup> they might also have eyries of hawks, sparrow-hawks, falcons, eagles, and herons, as likewise the honey found in their own woods.<sup>6</sup> Thus was a degree of relaxation given to the rigorous ordinances of William the Conqueror, who had appropriated the lands of others to the purpose of making them forest; the owners thereof were now admitted into a sort of partial enjoyment of their own property.

It was permitted that any archbishop, bishop, earl, or baron, coming to the king, at his command, and passing through the forest, might take and kill one or two of the king's deer, by view of the forester if he was present; if not, then he might do it upon the blowing of a horn, that it might not look like a theft. The same might be done when they returned.<sup>7</sup> No forester, except such as was a forester in fee, paying a farm for his bailiwick, was to take any chiminage, as it was called, or toll for passing through the forest; but a forester in fee, as aforesaid, might take one penny every half-year for a cart, and a halfpenny for a horse bearing a burthen; and that only of such as came through by licence to buy bushes, timber, bark, and coal, to sell again. Those who carried brush, bark, and coal upon their backs were to pay no chiminage, though it was for sale, except they took it within the king's demesnes.<sup>8</sup>

Part of this charter consisted of matters relating to the judicature of the forest. It was ordained, that persons dwelling <sup>The judicature</sup> out of the forest should not be obliged to appear before <sup>of the forest.</sup> the justices of the forest, upon the common or general summons; but only when they were impleaded there, or were pledges for others who were attached for the forest.<sup>9</sup> *Swainmotes* (which were the courts next below those of the justices of the forest) were to be held only three times in the year; that is, the first at fifteen days before *Michaelmas*, when the agistors came together to take agistment in

Ch. 6.  
Ibid. 13.

<sup>2</sup> *Bladum.*  
<sup>7</sup> Ibid. 11.

<sup>3</sup> Ch. 7.  
<sup>8</sup> Ibid. 14.

<sup>4</sup> Ibid. 9.  
<sup>9</sup> Ibid. 2.

<sup>5</sup> Ibid. 12.

the demesne woods; the second was to be about the feast of *St Martin*, when the agistors were to receive pannage: and to these two swainmotes were to come the foresters, verderors, and agistors, and no others. The third swainmote was to be held fifteen days before St John Baptist; and this was *pro fœnatione bestiarum*; to this were to come the verderors, and foresters, and no others; and the attendance of such persons might be compelled by distress. It was moreover directed, that every forty days throughout the year, the foresters and verderors should meet to see the attachments of the forest, *tam de viridî quàm de venatione*, as well for vert as venison, by the presentment of the same foresters.

Swainmotes were to be kept in those counties only where they had used to be held.<sup>1</sup> Further, no constable, castellan, or other, was to hold plea of the forest, whether of vert or venison (which was a prohibition similar to, and founded on a like policy with one in *Magna Charta* about theft); but every forester in fee was to attach pleas of the forest, as well for vert as venison, and present them to the verderors of provinces; and after they had been enrolled and sealed with the seal of the verderors, they were to be presented to the chief forester, or, as he was afterwards called, the chief justice of the forest, when he came into those parts to hold the

Punishments. pleas of the forest, and were to be determined before him.<sup>2</sup> The punishments for breach of the forest law were greatly mitigated. It was ordained, that no man should thenceforth lose either life or limb<sup>3</sup> *for hunting deer*; but if a man was convicted of taking venison, he was to make a grievous fine; and if he had nothing to pay, he was to be imprisoned a year and a day, and then discharged, upon pledges; which if he could not find, he was to abjure the realm.<sup>4</sup> Such were the tender mercies of the forest laws! Besides such qualifications of this rigorous system, it was ordained that those who, between the time of Henry II. and this king's coronation, had been outlawed for the forest only, should be in the king's peace, without any hindrance or danger, so as they found good pledges that they would not again trespass within the forest.<sup>5</sup>

These were the regulations made by the Charter of the Forest; which concludes with a saving clause in favour of the liberties and free customs claimed by any one, as well within the forest as without, in warrens and other places, which they enjoyed before that time. To the whole is subjoined a like confirmation as that to *Magna Charta*, in the 25th year of Edward I.

Many copies of the Great Charter and Charter of the Forest were put under the great seal, and sent to the archbishops, bishops, and other dignified ecclesiastics, to be safely kept; one of which remained in Lambeth Palace till a very late period.<sup>6</sup> It is said,

<sup>1</sup> Ch. 8.<sup>2</sup> *Ibid.* 16.<sup>3</sup> *Pro venatione.*<sup>4</sup> Ch. 10.<sup>5</sup> *Ibid.* 15.<sup>6</sup> It is mentioned by Bishop Burnet to have been among the papers of Archbishop Laud.

however, that Henry, when he came of age, cancelled, in a solemn manner, both those charters at a great council held at Oxford; and that he did this by the advice of Hubert de Burgh, chief justiciary, who of all the temporal lords, was the first witness to both the charters. Notwithstanding this, we find in the 38th year of this reign, A.D. 1254, a solemn assembly was held in the great hall at Westminster, in the presence of the king, when the archbishop of Canterbury and the other bishops, apparelled in their pontificals, with tapers burning, denounced a sentence of excom-  
Charters con-  
 firmed.  
 munication against the breakers of the liberties of the church and of the realm, and particularly those contained in the Great Charter and Charter of the Forest; and not only against those who broke them, but also against those who made statutes contrary thereto, or who should *observe* them when made, or presume to pass any judgment against them; all which persons were to be considered as *ipso facto* excommunicated; and if any ignorantly offended therein, and, being admonished, did not reform within fifteen days, and make satisfaction to the ordinary, he was to be involved in that sentence.<sup>1</sup> We shall see, in the succeeding reigns, how often these two charters were solemnly recognised and confirmed both by the king and parliament.

The first public act which presents itself in the statute-book after the two charters, is the *Statutum Hibernie de Statutum Hi-  
 cohæredibus*, 14 Henry III., which, from a considera-  
berniæ.  
 tion of the matter and manner of it, has been pronounced not to be a statute.<sup>2</sup> In the form of it, it appears to be an instruction given by the king to his justices in Ireland, directing them how to proceed in a certain point, where they entertained a doubt. It seems, the justices itinerant in that country had a doubt, when land descended to sisters, whether the younger sisters ought to hold of the eldest, and do homage to her for their several portions, or of the chief lord, and do homage to him; and certain knights had been sent over to know what the practice was in England in such a case. The following is stated as the usage of England at that time, agreeing with what is laid down both by Glanville and Bracton.<sup>3</sup> If any one holding *in capite* died, leaving daughters co-heiresses, the king had always received homage of all the daughters, and every one of them held *in capite* of the king; and accordingly, if they were within age, the king had ward and marriage of every one. And again, if the deceased was tenant to any other lord, and the sisters were within age, the lord was to have the ward and marriage of every one; but with this difference, that the *eldest only* was to do homage for herself and her sisters; and when the younger sisters came of age, they were to do their service to the lord of the fee by the hands of their eldest sister; the eldest, however, was not on that account to exact of the younger, homage, ward, or any other

<sup>1</sup> *Vide Pickering's Statutes.*

<sup>2</sup> *Old. Abridg. Tit. Homage, vide vol. ii., 99.*

<sup>3</sup> *Vide ante, 89.*



mark of subjection; for they were all equal in consideration of law, and deemed as one heir only to the inheritance; and should the eldest have homage of her sisters, and demand wardship, the inheritance would be in a manner divided, so that the eldest sister would be *simul et semel* seignioress, and tenant of the inheritance,—that is, heiress of her own part and seignioress to her sisters, which could not well consist together, the law allowing no other distinction to the eldest sister but the chief mansion. Besides, if the eldest sister should receive homage of the younger, she would be seignioress to them all, and should have the ward of them and their heirs; which was always guarded against by the policy of the law, that never entrusted the person or estate of a minor to the custody of a near relation; which is the very reason given by Bracton<sup>1</sup> why the younger sisters should not be in ward to the eldest.<sup>2</sup>

The other statutes made in this reign are the *provisiones* or *statutum de Merton*, 20 Hen. III., and the statute *de anno bissextili*, 21 Hen. III., after which there appears none till the 51st year of this king.

The statute of Merton contains eleven chapters, which are arranged with as little order as those of *Magna Charta*. The several alterations or confirmations of the law thereby made were as follow. We have just seen what provision had been made on the subject of ward and marriage by *Magna Charta*. To secure lords in this valuable casualty, it was now further ordained, that when heirs were forcibly led away, or detained by their parents or others, in order to marry them, every layman who should so marry an heir, should restore to the lord who was a loser thereby the value of the marriage; that his body should be taken and imprisoned till he had made such amends; and further, till he had satisfied the king for the trespass. This provision related to heirs within the age of fourteen; as to those of fourteen or above, and under full age, if such an heir married of his own accord without his lord's licence, to defraud him of his marriage, and his lord offered him reasonable and convenient marriage without disparagement; it was ordained that the lord should hold the land beyond the term of his age of twenty-one years, till he had received the double value of the marriage, according to the estimation of lawful men, or according to the value of any marriage that might have been *bonâ fide* offered, and proved of a certain value in the king's court.

Thus far the interest of lords was secured. The following provision was to protect infants against an abuse of this authority in their lords. If any lord married his ward to a villein or burgess where she would be disparaged, the ward being within the age of fourteen, and so not able to consent, then, upon the complaint of

<sup>1</sup> Bracton, 88.

<sup>2</sup> The introduction of the English law into Ireland, and the progress it made there, may very properly become an object of consideration in another place.

the friends, the lord was to lose the wardship till the heir came of age; and the profit thereof was to be converted to the use of the heir, under the direction of her friends. But if the heir was fourteen years old and above, so as to be by law of capacity to consent to the marriage, then no penalty was to ensue.<sup>1</sup> Again, if an heir, of whatever age, would not consent to marry at the request of his lord, he was not to be compelled; but when he came of age, and before he received his land, he was to pay his lord as much as any would have given for the marriage, and that whether he would marry or not; for as the marriage of an heir within age was a lawful profit to the lord, he was not to be wholly deprived of it, but was to be recompensed in one way or other.<sup>2</sup>

Some further provision was made respecting dower. It was provided by *Magna Charta*, that widows should give nothing for their dower; in order still further to secure to them a ready assignment of dower, it was now ordained, that persons convicted of deforcing widows of their dower, should pay in damages the value of the dower, from the death of the husband up to the time of giving judgment for recovery thereof; and they were moreover to be *in misericordiâ* to the king.<sup>3</sup> Because it had been doubted, whether, as a widow received her dower in the condition it was when her husband died, she should not leave it in like manner to the reversioner in the condition it was at her death; to remove this doubt, it was ordained, in favour of widows, that they might bequeath the crop upon their lands held in dower, as well as that upon their other lands.<sup>4</sup>

Usury, which we have before seen<sup>5</sup> was treated with little lenity by our old law, was now put under a particular restraint. It was provided, that usury should not run against any person within age, from the death of his ancestor, whose heir he was, until he arrived at his full age; a provision which was dictated, no doubt, by the consideration that the profits of the infant's lands went to his guardian during the wardship, and that he was thereby disabled from paying the annual interest. This new regulation was to be without any prejudice to the principal and the interest which had accrued in the lifetime of the ancestor.<sup>6</sup>

A provision made about commons of pasture was of great importance to lords of manors. When a lord, having great extent of waste ground within his manor, infeoffed any Of commons. one of parcels of arable land, it was usual for the feoffee to have common in such wastes, as incident to his feoffment; and this was upon very good reasons, for as the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, the tenant used to have this allowance of common for his beasts of the plough as appendant to his tenancy, and from thence arose common appendant. Right of common, therefore, was

<sup>1</sup> Ch. 6.<sup>2</sup> *Ibid.* 7.<sup>3</sup> *Ibid.* 1.<sup>4</sup> *Ibid.* 2.<sup>5</sup> *Ante*, 86.<sup>6</sup> Ch. 5.

founded upon the general interest of agriculture, and the particular one of the lord, whose land was thereby cultivated and improved. We have seen<sup>1</sup> that a remedy by assize had been devised to maintain tenants in possession of this right, but it seems this remedy had been pushed too far, and began to encroach upon the demesne and original right of the lord, who having suffered his tenants to range at large over his wastes, for which he had not yet found any use, could hardly appropriate any part thereof without the imputation of encroaching on his tenants, and being liable to an assize of disseisin of common of pasture. To prevent such usurpations upon the lord, and adjust the reasonable claims both of lord and tenant, the following regulation was made:—That when such feoffees brought an assize of novel disseisin for the common of pasture, and it was therein recognised before the justices that they had as much pasture as was sufficient for their freeholds,<sup>2</sup> and that they had free ingress and egress from their freehold to their pasture, then the person against whom the assize was brought should go quit for all the lands, wastes, woods, or pasture, which he had converted to his own use. But should it be alleged that they had not sufficient pasture nor sufficient ingress or egress, the truth thereof was to be inquired of by the assize; and if it was found as alleged, then they were to recover their seisin by view of the jurors, and the disseisor was to be amerced as in other cases<sup>3</sup> (a).

The administration of justice was aided by a law concerning repeated disseisins, or, as they were afterwards called, *re-disseisins*. It was ordained, that when any person recovered seisin of his freehold, before the justices in eyre, by assize of novel disseisin, or by confession of the disseisors, and seisin had been delivered by the sheriff; if the same disseisors again disseised the same tenant of the same freehold, and were convicted thereof, they should forthwith be committed to prison till they were discharged by the king upon payment of a fine. The way of bringing such contemnors of the law to punishment is thus directed by the statute. When complaint was made at the king's court, the parties injured were to have the king's writ directed to the sheriff, in which a relation was to be made *de disseisinâ factâ super disseisinam*, of a disseisin upon a disseisin; and the sheriff was to be thereby commanded, that he, taking with him the keepers of the pleas of the crown<sup>4</sup> and other lawful knights, should go to the place in question, and there, in their presence, by the first jurors and other neighbours

(a) The comment of the *Mirror* upon this is:—"The point of improvement of wastes is culpable, as being too general; for it ought to distinguish of commons; for in some places the commoners are enfeoffed in such a manner, that the whole common is only in the tenants; so that the lords have nothing but the soil; and in such case the statute is prejudicial to the commoners, and repugnant to the Great Charter, which willeth that none be cast out of his freehold without lawful judgment" (*Mirror*, c. v. s. 2). But it only applied where the commoners had sufficient.

<sup>1</sup> *Ante*, c. 4.

<sup>2</sup> *Ad tenementa sua*.

<sup>3</sup> Chap. 4.

<sup>4</sup> *Vide ante*, where these are supposed to be the coroners of the county.

and lawful men, make diligent inquisition of the matter; and if the party was convicted, he was to be dealt with as before mentioned, if not, the plaintiff was to be amerced. The sheriff was not to entertain such a plaint without the king's special command, namely, by writ. What is here said of lands recovered in assize of novel disseisin, extended to those recovered by assize of mortaucestor, or in any proceeding *per juratam*.<sup>1</sup>

An alteration was made in the limitation of time for bringing certain writs. In a writ of right, as the law had been for some years, a descent might be conveyed *à tempore Henrici regis senioris*; but it was now ordained that there should be no mention of so distant a time, but only *à tempore Henrici regis avi nostri*. Writs of *mortaucestor*, *de nativis*, and *de ingressu* (a writ which had lately sprung up, and of which more will be said hereafter) were not to exceed *ultimum reditum domini regis Johannis patris nostri in Angliam*, king John's last return from Ireland into England; nor writs of novel disseisin, *primam transfretationem domini regis Henrici, qui nunc est, in Vasconiam*.<sup>2</sup>

Before another chapter of this statute is mentioned, it may be convenient to recollect that there were two kinds of suits; suit *real*, as it was afterwards called, and suit *service*. Suit real was, in respect of residence, due to a leet or tourn; suit service was, by reason of tenure of land, due to the county, hundred, wapentake, or manor, whereunto a court baron was incident. Every one who held by suit service was required to appear in person, because the *suitors* were judges in those courts; and if he did not, he would be amerced, which was a heavy grievance; for it might happen that he had lands within divers of those seignories, and the courts might all be kept in one day; therefore, as he could attend personally only at one place, it was provided by this act, that every freeman who owed suit to the county, trithing,<sup>3</sup> hundred, wapentake,<sup>4</sup> or to the court of his lord, might freely make his attorney to do suit for him.<sup>5</sup> This permission did not enable him to do the same at the leet or tourn, because he could not be within two leets or two tourns.<sup>6</sup>

It is recorded in the statute of Merton, that the question about the legitimacy of children born before wedlock was still agitated between the clergy and common lawyers; the former maintaining their legitimacy, according to the constitution of Pope Alexander; the latter alleging this to be contrary to the common law; as hath been mentioned before.<sup>7</sup> The bishops

<sup>1</sup> Ch. 3.

<sup>2</sup> Ch. 8. Henry I. began his reign, A.D. 1100; Henry II. A.D. 1154; King John went to Ireland in the twelfth year of his reign, and returned the same year; between that and the 20th Henry III. were about twenty-five years. Henry III. went into Gascony for the first time in the fifth year of his reign; so that there were about fifteen years between that and the statute of Merton (2 Inst. 94, 95). Writs of mortaucestor before this act were *post primam coronationem Henrici II.* which was 20th October 1154. Those of novel disseisin were *post ultimam transfretationem Regis in Normanniam*, which was in 1184, the thirtieth year of his reign. *Vide ante*, 189.

<sup>3</sup> A district containing three hundreds.

<sup>5</sup> Ch. 10.

<sup>6</sup> 2 Inst. 99.

<sup>4</sup> Another name for a hundred.

<sup>7</sup> *Vide ante*, c. 3.

now urged in council, that when the king's writ of bastardy was directed to them, to inquire whether a person born before wedlock was entitled to the inheritance, they neither could nor would give any answer thereto, because the question was put in a special way, and not in the form required by the church, which was general, whether bastard or not; and therefore, to make an end of the controversy and the difficulty at once, they prayed the nobles to consent that all such as were born before matrimony should, consistently with the law of the church, be deemed legitimate, and be entitled to succeed to the inheritance, equally with those born within wedlock.<sup>1</sup> But the statute says, *omnes comites et barones unâ voce responderunt, quòd nolunt leges Angliæ mutari, quæ hucusque usitatæ sunt, et approbatæ*.<sup>2</sup> This point of difference between the canon law and the law of the land did not rest here. In the same year, a solemn agreement was made between the king, bishops, and barons in council assembled, and by this the practice was settled, as will be shown when we come to speak more particularly on the subject of bastardy. The nobles, who resisted the inclination of the ecclesiastics with such firmness, had no scruple to propose an innovation which had no object but to accommodate these potent landholders, at the expense of the liberty of the subject; but in this they were opposed by the king, who refused his consent: the proposal was, that they might imprison in a prison of their own all persons that were found trespassing in their parks and vivaries.<sup>3</sup>

In the next year, there follows in the statute-book a public instrument which is entitled, the statute *de Anno Bissextili*, 21 Hen. III.; but which is, in truth, nothing more than a sort of a writ, or direction, to the justices of the bench, instructing them how the extraordinary day in the leap-year was to be reckoned, in cases where persons had a day to appear at the distance of a year, as on the essoin *de malo lecti*, and the like. It was thereby directed, that the additional day should, together with that which went before, be reckoned only as one, and so, of course, within the preceding year.

After this, there are no statutes (except the confirmation of the charters, 38 Hen. III., which has been mentioned already) till the fifty-first year of this king. During this interval of thirty years, great progress was made towards bringing the law to that state of consistency and learning to which it arrived in this reign (a); there

(a) Thus we find the point of the law of descent stated by Bracton, as cited by Pateshall, justice:—"Ut de itinere Martin de Pateshall in comitatu Hertford, anno regni Henrici Quarti, in fine rotuli" (fol. 13). So an important decision as to imbecility of mind, that a person paralysed may be of sound mind:—"Et notandum quod si paralyticus itineret de loco in locum et discretionem habet ab eo præsuumatur quod omnia rite gesserit, et de aliis non est ita intelligendum, quia quamvis itinerare non possit, tamen bonam memoriam habere poterunt. Et de hac materia

<sup>1</sup> This piece of canonical jurisprudence is actually adopted in the law of Scotland. They consider the subsequent marriage as having been entered into when the child was begotten; and therefore it is confined to the case of such women, whom the father, at that period, might have married. *Ersk. Prin.*, b. 1. tit. 7, sect. 37.

<sup>2</sup> Ch. 9.

<sup>3</sup> Ch. 11.

is also the strongest proof<sup>1</sup> that the treatise of Bracton was written

plenius invenis de termino anno regni Henrici decimo quinto in comitatu Berk, de Roberto de Burnley" (fol. 15). So an important decision as to donations, that they must be free, and not in any way the result of coercion :—" Gratuita debet donatio et non coacta, nec per metum vel vi extorta ut si quis cartam et donationem cognoverit requisitus excipiat tamen quod valere non debeat, eo quod per metum et coactionem tempore guerræ aliove quocunque tempore illam fecerit revocabitur donatio, etc., ut inter placita quæ sequuntur regem, anno regni regis Hen. II. inter priorem de Walingford et Rogerum de Quincy" (fol. 17). And so another, ruling that if it is in time of peace, the man must promptly disclaim the donation :—" Si autem tempore pacis compulsus fuerit quis per metum et vim in prisona ad aliquid dandum vel faciendum contra voluntatem suam, cum a prisona et violentia evaserit, statim debet levare hutesium et clamorem, et accedere debet ad villas propinquiores, et ad servientes regis, et postea ad comitatum, et ibi ostendere violentiam ei factam et sic revocabitur quod actum erit. Si autem dissimulaverit, videtur consentire, ut de quodam itinere S. de Segrave, in comitatu Kantii, de Petro de Peke qui summonitus fuit ad warrantandum Falconi de Breaute, quandam cartam de manerio de Middleton; et unde iudicium redditum fuit apud Westmonasterium" (f. 17). Now, a little piece of contemporary history renders this case—a leading case (as it is the earliest) in the law of duress—very interesting, and illustrative of the times. This Falcon de Breaute is described by Matthew of Westminster, A.D. 1215, as one of the retainers of John, and as a most atrocious plunderer. He is described as seizing noblemen, and even ladies, and clerics of the highest rank, in order to extort ransom from them. In the reign of Henry III. this man became so outrageous, that he actually seized the king's justiciary, and imprisoned him in his castle. This was too much for the king, who levied an armed force, laid siege to the castle, and when, after two months, he had taken it, he hanged all who were in it (A.D. 1224). This may serve to show that these cases were then of actual and frequent occurrence, and that the law of duress was then of very considerable practical importance. Other cases are cited : " De itinere Abbatis de Rading et Martin de Pateshall in comitatu Leycestrie (fol. 13), and in comitatu Bedeford de Richardo le Hare" (*Ibid.*) Sometimes, it will be observed, that the decisions are quoted of the justices of the Bench—i.e., the judges of the *curia regis*, the king's court. As a point of villenage :—" Dictum est in curia regis coram iusticiariis de banco apud Westmonasterium per Johannem de Mottingham et socios suos Iusticiarios" (fol. 26). Generally, however, the cases are from the itinera. So a point of law as to gifts of land in frankalmoigne (that the heir is bound to warrant or defend, if he knew of the gift), is cited as decided by the celebrated Pateshall :—" De itinere Martin de Pateshall, de loquela diversorum comitatum, quæ fuerunt super iudicium in itinere suo anno regni tertio Henrici de magistro militiæ Templi in Anglia," in the case of the Knights Templar of England (fol. 28). So another important point on the same subject—viz., that if, a few days before death, a man gives land to a religious house, the heir could not recover it, is cited as ruled by the same justice in his last circuit :—" Ut de ultimo itinere Martin de Pateshall in comitatu Eborum" (fol. 28). So an important decision as to advowsons, that they could not be transferred, except as incident and attached to the property in land :—" Et quod advocatio quod incorporalis est, transferri non potest, sine re corporali et tenemento, probatur de termino Sancti Hilarii, anno regis Henrici nono comitatu Norf. inter abbatem de Messendene et Hubert de Burgh, de ecclesia de Ow Walton, ubi idem abbas protulit quandam chartam cujusdam Walteri de la Penne, quod testabatur quod idem Walterus dedit ei advocationem illius ecclesie, sed quia postea convictum fuit quod idem Walterus nullum tenementum habuit in manerio in quo ecclesia sita fuit, nec idem W. nunquam presentavit ad ecclesiam illam, consideratum fuit quod abbas nihil capiat" (fol. 54). " Item ad hoc facit quod habetis de termino Sancti Hilarii anno regis Henrici sexto comitatu Staff. de Raulf comite Cestrie et Priore de Kenelwyde, de ecclesia de Stoke, ubi dicitur quod ille qui dedit advocationem priori nec aliquis antecessorum suorum, nunquam seysinam habuit presentandi nec aliquod tenementum in villa illa, consideratum quod donatio illa nulla. Item ad hoc facit quod habetis de termino Paschæ anno regis Henrici nono in comitatu Cornubiæ de Ricardo de Wyks et Priore de Tuwardrey, ubi non valuit donatio facta de advocatione quia ille qui dedit nunquam facit in seysina presentandi nec terram aliquam habuit in villa illa, ad quod advocatio illa potuit pertinere; quod vis multæ

within this space of time (*a*); and that the account of the law given by that author, does not include the alterations made therein by the statutes passed in the 51st and 52d years of this king. It seems therefore the most natural order, to postpone the consideration of those statutes till we have taken a view of the previous state of the law; from whence we may proceed to the alterations made therein by those statutes.

This view of the law, as it stood towards the end of the present reign, will include in it not only a fuller account of what has been before delivered from the authority of Glanville, but likewise the numerous additions, variations, and improvements that had been made since his time. This will be extracted, as we promised, from that great ornament of our ancient jurisprudence, the treatise of Bracton, from which such parts will be selected as are thought

confirmaciones, episcoporum et dominorum capitalium intervenissent" (*Bracton*, lib. ii. c. 22, fol. 54). "Et quod donatio facta de advocacione valere non debeat, ante quam donata fecerit in possessione presentandi, probatur in rotulo, anno reg. Hen. oct. in comitatu Bed. Item ad hoc facit quod habetis de itinere Martin de Pateshall in comitatu Wygorn: anno reg. Hen. quinto. Item nec valet donatio advocacionis, si ille qui dedit nunquam habuit seysinam presentandi nec aliquid de manerio ne tenementi ad quod advocatio pertinuit, ut inter *placita quæ sequuntur regem*, anno rogni regis Henrici tertii vicesimo secundo in comitatu Salop: de Godfridis de Ganages, ubi idem Godfridus dixit *coram rege* quod antecessor suus dedit patri suo quandam terram cum advocacione ecclesie, et unde convictum fuit quod antecessor nunquam seysina inde habuit, et ideo donatio nulla. Item ad hoc facit ann. R. Hen. 10, in comitatu Leyc. inter Walterum de Redgrave et priorem de Undeleigh, ubi idem Walterus nil capere potuit per assisam quia comes de Ferraris qui manerium illud ad quod advocatio illa pertinuit dedit prædicto Waltero, nunquam presentavit ad ecclesiam illam. Item ad hoc facit quod habetis de anno Hen. 9, inter priorem de Lewes, et de novo mercato de ecclesia de Hatfelt," &c. (*Ibid.* p. 55). These cases are cited as showing how constantly they occurred, and how the right of presentation was contested, and how the right was made to depend entirely upon actual possession of temporal property. A case between the abbot of St Albans and Galfrid de Chyldwike, about the franchise of a free warren, is cited as having been decided "apud Westmonasterium coram ipso Domino rege," i.e., in the king's bench, as it concerned a royal franchise (lib. ii. c. 24, p. 56). It may be mentioned, that such portions of Bracton as are not founded on such decisions, are founded on Glanville and Justinian. And as regards civil matters, perhaps by far the largest portion of Bracton is taken from the latter sources, whence, also, there is little doubt, the judges whose decisions are cited derived their light; for where else could they have derived it? As regards criminal matters, however, the criminal law being more a matter of custom, the decisions of the justices itinerant are more fully quoted; and the chapter "De Corona" commences with their commissions and authorities.

(*a*) It has escaped the attention of the author that the great work of Bracton contains brief accounts of numerous cases decided, during this period, on the itinera or circuits of the judges. These are the earliest of our law reports, with the exception of the brief notices in the *Mirror* and the *Abbreviatio Placitorum*; and some of them may be of interest, as showing the gradual course and development of law by means of judicial decisions, which took place in consequence of the establishment of a regular judicature. In one passage Bracton says, it is not sufficient for the plaintiff to propound and ground his case, &c., unless he also proves it according to what was proved in the itinera of Bishop of Dunwich and Martin de Pateshall, in the county of York, 3 Hen. III., in the case of Aghevilda Murdac. And, again, that if the claimant gives no proof, it is not necessary for the tenant to answer, for that a case may fail in proof as well as in law:—"Quia posset deficere probatio licet nunquam deficiat jus," as was held in the itinera of the Bishop of Dunwich and Martin de Pateshall, in the county of York, the 3 Hen. III., in the case of Reginald Shurdake. —(*Bracton*, 326). Others of these cases have been already cited, *ut supra*.

best suited to the design of this history of our judicial polity. As the plan we here propose will lead us to reconsider all or most of the topics which were examined in the reign of Henry II., it will be very difficult to avoid the appearance of repetition. This will be guarded against as much as possible; and we trust that the reader will be satisfied that no subject is brought before him a second time, but where the nature of the inquiry and the progress of the history made it absolutely necessary.

We shall begin our short view of the law in this reign with some observations on the rights of persons. The ranks of freemen are stated by Bracton to be these: dukes, Ranks of persons. earls, barons, *maguates*, or vavasors, knights, and those who were plain freemen. Vavasors, he says, were persons *magne dignitatis*, and were so called *tinquam vas sortitum ad VALETUDINEM*.<sup>1</sup> The condition of *servi*, or *villani*, as they were commonly called, is more particularly described by this author than by Glanville, and the nature of that state may be tolerably well collected from his account of it.<sup>2</sup> The *servus*, though he was generally considered as *in potestate domini*, and not *sui juris*; yet, as to life and limb, he was entitled to the protection of the law. The lord might take from his villein everything he had, even his principal piece of property, which was usually his *waynagium*, or implements of husbandry; the rule being, that *quicquid per servum acquiritur id dominio acquiritur*.<sup>3</sup> These *servi* did not escape from their condition by going off the land of the lord, if they continued in the habit of returning; and sometimes they used to be permitted to absent themselves for a length of time from the lord's lands, and employ themselves in trade, upon paying to the lord a fine called *chevagium*, or chiefage, as an acknowledgment of their subjection and villenage (a). But if they left the lord's land without returning regularly, or ceased to pay their *chevagium*, they were then considered as fugitives; and when they were once become fugitive, they were to be pursued and demanded by the lord, both within liberties and without; for which purpose the aid of the king's

(a) It is remarkable how tenaciously the author confounds the slave with the villein. The *Mirror*, which followed Bracton, most carefully distinguished them, as did Bracton himself, and it is remarkable how the *Mirror* and Bracton correspond. Thus, as to villeins, the *Mirror* says: "Villeins be not all slaves, for these can purchase nothing but to their lord's use. They know not in the evening what service they do in the morning, nor any certainty of their service. Their lords may fetter, imprison, beat, or chastise them (saving their lives and members); they may not fly from their lords so long as they find them wherewith to live, nor is it lawful for others to receive them without their lord's consent; they can have no manner of action without their lords; and if they hold lands of their lords, it is intended that they hold them from day to day at their lord's will, and not by any certain tenure." "Villeins are tillers of land dwelling in upland villages, for by vill cometh villein, and of villeins mention is made in the great charter of liberties, where it is said that a villein be not so grievously amerced that his tillage be not saved to him; but the statute maketh no mention of slaves, because they have nothing of their own to lose." Here villeins are carefully distinguished from slaves.

<sup>1</sup> Bract. 5 b.<sup>2</sup> Vide Schmidt Geschichte, &c., vol. i. 596.<sup>3</sup> Bract. 6.



officers might be had :<sup>1</sup> and after such claim had been made, the *servus*, though he was not taken till after a year had elapsed, might be detained ; but if no such claim had been made, then, at the end of a year, the *servus* would be privileged, and considered as free. So strictly was claim required to be made, that if the lord, after the lapse of three or four days only, without making any claim, had taken him anywhere *extra villenagium*,<sup>2</sup> beyond the limits of his villenage, he would have been liable to an action for imprisonment.

It seems that villeins in the king's demesnes were of different kinds. There were those who had been such before the Conquest, and who, in consequence of the polity then established, were permitted to hold their land in villenage,<sup>3</sup> by villein and uncertain services, and who were to do everything which their lords commanded them. But in the disorder of that revolution, many free-men were dispossessed of their lands by the lords to whom they were allotted, and were afterwards permitted to hold them in villenage, with the burthen of doing some villein offices, which however were certain and specified. These persons were, according to Bracton, sometimes called *glebæ adscriptitii*, because, -so long as they did the appointed services, they had the privilege *not to be removed* from the land ; and were indeed freemen : for though they did villein services, yet it was not in their own personal right, but on account of their tenement, which was held in villenage, though, says Bracton, a sort of privileged villenage.<sup>4</sup> "There was," says the same authority, "another holding in the king's demesne manors, which was by the same villein customs and services as the former, and yet was not villenage ; nor were the tenants *servi* ; nor did they derive their title from the Conquest, as the former did, but by covenant with their lords ; so that some of them had charters, and some not ; and these, if ejected, might recover seisin by assize, which none of the former could. Besides these, there were also tenures by socage, and knight-service, in the king's demesnes." These latter, says Bracton, were *ex novo feoffamento*<sup>5</sup> and *post Conquestum* ; by which he seems to intimate his opinion as to the origin of the two principal tenures—those in socage and by knight-service.<sup>6</sup>

A villein might also become free by manumission ; which was a solemn and express act of declaring him free. There were other acts of the lord which were construed to amount to a declaration of a villein's liberty, because they put him into a condition incompatible with a state of servitude. Thus, if a lord was to receive homage of his villein, or should, without any express manumission,

<sup>1</sup> Bract. 6, b.

<sup>2</sup> *Extra villenagium*, that is, "out of his state of villenage," or, beyond the lord's villen-territory.

<sup>3</sup> *Vide ante*, p. 29.

<sup>4</sup> Bract. 7.

<sup>5</sup> But see Madox *Excheq.*, vol. i. 578, of old feoffment and new feoffment.

<sup>6</sup> Bract. 7 b.

give land to his villein, *habendum et tenendum liberè* to him and his heirs, though no homage was done, such gift was considered as an intimation that the donee should become a freeman. Nevertheless, if a gift was made to hold *per liberum servitium*, it was otherwise; there being, according to Bracton, a difference between holding *liberè* and *per liberum servitium*; for, as a tenure in villenage would not make a freeman a villein, so a holding by free service would not make a villein free, unless it was preceded by homage.<sup>1</sup>

Bracton speaks of two orders of villeins: namely, those who held in *pure villenage*, and those who held in *villein socage* (*a*). In the former, the service was uncertain and indeterminate; so that the villein, according to his expression, did not know in the evening what was to be done in the morning, but was to do everything that was commanded him: in the latter, the service was certain; and yet the holding was not *liberum tenementum*, or freehold. Neither of these could alien their lands, as freeholders could; and if they did, it might be recovered at law;<sup>2</sup> but the way in which a villein socman was to make a transfer of his estate, was this: he was first to make a surrender of it to the lord, or, if he was not present himself, to his steward,<sup>3</sup> and from his hands the conveyance was to be made to the purchaser; and this was considered as the gift of the lord, in whom, and not in the villein socman, the freehold resided.<sup>4</sup> Bracton does not say whether those who held in pure villenage had even the power of transferring their lands in this limited way; and it should seem, they had not yet obtained such privilege.

We are enabled to speak more particularly of tenures than we did in the reign of Henry II.; they had now become more defined, were better understood, and treated with much more refinement. Tenure depended on the services reserved at the time of the feoffment (*b*); and therefore, to understand the

(*a*) This has already been pointed out more than once. Here, again, it will be observed how closely the *Mirror* follows Bracton, and distinguishes slaves from villeins. The *Mirror* word for word corresponds with Bracton, so that the author must have studied the great treatise. Speaking of slaves the *Mirror* says: "They know not in the evening what service they shall do in the morning, nor is there any certainty of their service." But of villeins he says, "they are tillers of land," which is the description of socage-service as given by Bracton and Littleton, that is, ploughing the land, a service certain and defined in its nature. Yet, being at the will of the lord, and, although certain in its nature, not so as to its extent, it was not free socage, but servile socage, or, as Bracton calls it, villein socage. This was the origin of our copyhold tenure, as socage was of our freehold tenure. Pecuniary commutation, by way of price or fine, lay, probably, at the basis of the conversion of the tenures.

(*b*) It was not necessary that there should be any deed to create a freehold estate of inheritance, and the giving of such an estate conferred entire freedom. Thus the *Mirror* says, "Villeins become freemen if their lords grant or give unto them any free estate of inheritance to descend unto their heirs, or if the lord take their homage for their land" (c. iii. s. 28); and it is observed, "that by the first conqueror earls were enfeoffed of their earldoms, barons of their baronies, knights of knight's fees, sergeants of serjeanties, villeins of villenages, burgesses of boroughs, whereof some received their lands without obligation of service, i.e., a frankalmoigne, some to hold by homage and by service, as for defence of the realm; and some by villein customs, as to plough

<sup>1</sup> Bracton, 24 b.<sup>2</sup> *Ibid.* 26.<sup>3</sup> *Serrenti.*<sup>4</sup> Bracton, 26.

nature and variety of tenures, it will be necessary to consider more particularly the clause of *reddendum*, by which the services were reserved in deeds of feoffment. When a donation was made by a private person, it was usual to express in the deed, with some precision, whatsoever was to be rendered to the donor in compensation for the thing given. Thus a gift was made sometimes *pro homagio et servitio*, for homage and service; sometimes for service only, without homage. If it was intended to create a knight's fee, the proper reservation would be *pro homagio et servitio*; but in the creation of a socage-tenure, it would not be so proper; as fealty only, and not homage, was due for socage-land: and indeed should homage have really been done, yet this would not entitle the chief lord to wardship and marriage; for ward and marriage did not so properly follow the homage, as the service, which in fact, and which alone, made a tenure, either military or socage. Thus it often happened that homage was not required even in military tenures; as where one made a gift to his eldest son and heir, or a brother to a younger brother, such gifts were usually made without reserving homage, lest the donor should be excluded from succeeding to the inheritance by the rule *nemo potest esse dominus et hæres*. For the same reason, gifts, when made to a younger son, used to be, *pro servitio tantum, tenendam de me totâ vitâ meâ sibi et hæredibus suis, et post mortem meam de capitalibus dominis pro servitio quod illam terram pertinet*. When the service was reserved in this way, the elder son might be heir to the younger, because there was no homage to constitute a *dominium*: if the gift had been *tenendam de capitalibus dominis*, it would have excluded him from the wardship also. In like manner, if a gift was made by the father to the eldest son, whether it was *pro servitio* or *pro homagio*, if it was to hold of the chief lord of the fee, and he died in the life of the father; the younger brother would succeed, and the father be

the lord's lands, to reap, cut, and carry his corn or hay in such manner of service without giving of any wages, whereof many fines were levied of such services, which make mention of them. And although it be that the people have no charters, deeds, nor muniments of their lands, nevertheless, if they were ejected, or put out of their possession wrongfully, by bringing an assize of novel disseisin, they might be restored to their estates as before, because they could aver that they knew the certainty of their services as those whose ancestors were astraces for a long time; and therefore Edward in his time caused inquiry to be made of all such who held and did to him such services as ploughing his land, &c. And afterwards many of these villeins were forced by wrongful distresses to do their lord service, to bring them into servitude again, for which their remedy was by a writ of *ne injuste vexes*. Now it is most remarkable that in this passage (evidently written soon after the Conquest) among the tenures enumerated, common freehold is not mentioned. Tenure in knight-service is mentioned, and tenure in villenage; and then it is described how, out of these last, freehold tenure arose, by the lords giving the villeins free estates of inheritance, on condition of plough-service, which in its nature was certain, and not deemed base, though servile. It is also pointed out that not only did this require no deed, but not even express a formal gift; it was enough if homage were taken for the land, as that implied freedom. Then came the socage freehold tenure, as it was called, of which Bracton, transcribed by our author, speaks; in his time it having become established as a known freehold tenure, whereas in the time the above passage in the *Mirror* is mentioned, it was just arising.

excluded from the wardship ; if he was a minor, the ward and marriage would belong to the chief lord, and if of full age, the relief likewise.<sup>1</sup>

The reservation was sometimes *reddendo* so much *per annum* at certain times, or *faciendo* such and such services and customs, *pro omni servitio, consuetudine seculari, exactione, et demandâ* ; by which all secular demands that belonged to the lord in right of the tencement were remitted. It must be observed of services and customs, that some belonged to the lord of the fee, and some to the king, corresponding with the distinction beforementioned between suit *service* and suit *real*.<sup>2</sup> Of the latter kind, says Bracton, were *sectæ ad justitiam faciendam*, as in writs of right ; *ad pacem*, to sit in judgment on a thief ; and *pro aforciameto curiæ*. To the donor of the land belonged such services as were due in recompense of the thing given, as rents, whether in gold or silver, in monies numbered ; as if it ran *reddendo inde per annum decem aureos, argenteos* ; or whether it consisted in fruits and profits of the ground, *reddendo inde per annum decem coros tritici*, four quarters of barley, four barrels of oil, or the like. Sometimes the reservation was made optionally ; as, *reddendo inde per annum* so many gilt spurs, or sixpence, or a pound of pepper, or cumin, or wax, or a certain number of gloves ; in which cases it<sup>3</sup> was at the option of the tenant which of them he would pay. Some services were to be performed to the lord of the fee, and consisted in doing some act at certain seasons : unless such services were specified, they would not be demandable ; as where it was said, *et faciendo inde sectam ad curiam domini sui, et harredum suorum, de quindenâ in quindenam*, &c., or, *faciendo inde* so many ploughings or reapings, and the like ; all which belonged to the lord of the fee, and were due out of and in right of his farms and tenements, and therefore were not personal, but feudal or predial services.

A person might infeoff another to hold *by serjeanty*, which was of different kinds : some such services belonged to the lord who infeoffed ; some to the king. Thus, for instance, when a person was to hold by the service of riding with his lord,<sup>4</sup> or of holding the lord's pleas, or serving his writs within a certain district, or feeding his dogs or hounds, keeping his birds, finding him in bows and arrows, or carrying them, and innumerable like services ; all these were called serjeanties. Services being divided into such as were called *forinsic* and such as were denominated *intrinsic*, all the above-mentioned they considered in a particular manner as *intrinsic*, because they were of necessity to be expressed in the charter ; and they were likewise reserved to the lord of the fee, and had not any reference to the king's army or the defence of the realm : in such tenure no ward or marriage accrued to the lord, any more than in socage. These were usually called *petit ser-*

<sup>1</sup> Bract. 34 b.<sup>2</sup> *Vide ante*, 265.<sup>3</sup> Bract. 35.<sup>4</sup> Which tenants, says Bracton, are usually called *Rod Knights*.

*jeanty*, to distinguish them from such as related to the king only. A serjeanty of this latter kind was,<sup>1</sup> when a person was infeoffed by the service of finding one or more men to go with the king upon any military expedition with some kind of accoutrement; and from such a serjeanty, whether held of the king or a private person, there were due to the chief lord the ward and marriage of the heir.<sup>2</sup>

It was before said, that the above services, which were specified in the deed, were called *intrinsic*. This term and its opposite were not wholly confined to express that services were or were not in the charter; for some other services, though expressly named in the charter of feoffment, were termed *forinsic*, because they belonged to the king, and not to the chief lord. These were performed without the tenant appearing in person, for he might satisfy the king, some way or other, for the service: they were due as accident or necessity made them requisite, and were called by various names. They were not only termed generally *forinsic*, as they belonged to the king, but had various other names of a more specific import. They were sometimes called *scutagium*, sometimes *servitium domini regis*; the meaning of which was this: they were called *forinsic*, because the service was done, *foris* abroad, that is, *extra servitium* due to the chief lord; *scutagium*, because it related *ad scutum*, and the military service; *servitium regis*, because it belonged to the king, and not to the lord; and a feoffment by either of these latter appellations was considered as the same thing: yet if a charter gave land *faciendo inde forinsecum servitium*, &c., the service, or the substitute for service, was to be expressed; as by the service of one knight's fee, or more; by the scutage of a hundred shillings; and the like.<sup>3</sup>

There were other customs and dues which were neither intrinsic nor forinsic, but were rather, says Bracton, *concomitants* of services regal or military, and of homage. These were relief, marriage, and wardship, which need not be expressed in the charter; because if homage and regal service preceded, it followed that these belonged to the chief lord, whether it was a knight's service, or a serjeanty relating to the army. There were other customs and dues which, Bracton says, were not called services, nor the concomitants of services; as reasonable aid to make the eldest son a knight, or marrying his eldest daughter; which aids were *de gratiâ*, and not *de jure*,<sup>4</sup> and were in consideration of the lord's necessities; for they were only to be demanded of his freemen in cases of necessity. These aids, too, were considered as personal, and not predial; for

<sup>1</sup> It might be expected that Bracton should call this latter *magna serjeantia*, to distinguish it from the other kind; but he does not. In another part of his book we are told by this author that serjeanty was divided into *magna* and *parva*, with respect to its *value*, and, as it should seem, not with any distinction between a service performed to the king, and to a common person. This value appears not to have been very accurately defined. He says that, according to some, it was a great serjeanty if valued at 100 shillings; and those, says he, might be called *petit serjeanty* that were worth half a mark. (87 b.) Whatever difference of opinion there was about the names, there seems to have been none about the consequences of the respective services, namely, in what cases ward and marriage was demandable by the lord, and in what not.

Bract. 25 b.

<sup>3</sup> *Ibid.* 36 b.

<sup>4</sup> *Vide ante*, 127.

they respected the person, and not the fee, as may be collected from the terms of the king's writ which used to issue to the sheriff, commanding him, *quòd justè et sine dilatione habere faciat tali rationabile auxilium de militibus liberè tenentibus suis in ballivè suâ, &c.* As these aids were not to be levied at the pleasure of the lord, respect was to be had, in assessing them, to the circumstances both of the tenant and lord, so as the lord might be relieved without oppressing the tenant; or, as Bracton says, *quòd auxilium accipienti cederet ad commodum et danti ad honorem.*<sup>1</sup>

A man might be infeoffed by divers kinds of services; as, by the service of one penny, and rendering scutage (that is, when demanded for particular occasions, as before-mentioned), and by one or more of the serjeanties above noticed. If the render was to be only in money, without any scutage or serjeanty; or if two services were required optionally, as to give some certain thing *pro omni servitio*, or a certain sum of money; such a holding was called *socage*: but though it was only for the payment of one farthing, if scutage and real service were added thereto, or if any serjeanty was reserved, it was considered as knight-service.<sup>2</sup> The creation of all these tenures depended on the pleasure of the feoffor; for whatever might be the service he was bound to perform towards his feoffor, he might exact either more or less, upon making a feoffment to another. Thus a tenant by knight's service might infeoff another in socage, or make a grant in villenage. Again, he might require knight's service, though he held only in socage:<sup>3</sup> and in such case, as well as in others, the tenant was protected against the chief lord by the warranty of the mesne, who stood between them.

The different kinds of tenure appear, from the above inquiry, to be these: some were by military service, since called knight's service, others by serjeanty; for which homage was to be done to the chief lord, because of the forinsic and regal service, and of that which related *ad scutum*, and the military calls for the defence of the country. Another was a holding *in soccagio libero*, in *free socage*, where the service to the chief lord consisted in money and nothing was due *ad scutum et servitium regis*: this was called socage from *soccus*, a plough; because the tenants thereof were deputed, as it should seem, merely to be cultivators of the ground. In this tenure the ward and marriage belonged to the nearest relations; and though homage should *de facto* be done for such land as it sometimes was, the chief lord was not on that account entitled to the ward and marriage, as those casualties did not always, though they usually did, follow homage. There was another kind of socage, called *villein socage*, where homage was never done, but only the oath of fealty was taken; the lord being interested to see that his villein did not, by any surprise, become his homager.<sup>4</sup>

We are next to consider the circumstances of tenure, the principal of which were *homage*, *fealty*, and *relief*. Much stress was

<sup>1</sup> Bract. 36 b.<sup>2</sup> *Ibid.* 37 b.<sup>3</sup> *Ibid.* 36.<sup>4</sup> *Ibid.* 77 b.

laid on homage, to which was ascribed greater efficacy than to any other part of this system, as it was the tie of feudal connexion between lord and tenant. Homage is therefore defined by Bracton to be that legal bond by which a lord is held and bound to warrant, defend, and quiet his tenant in his seisin against all mankind, for a service performed by him, as expressed in the deed of gift; and, on the other hand, that obligation by which a tenant was equally bound to preserve his faith towards his lord, and to do his proper service; which connexion as has been before shown, is thus expressed by Glanville; *tantùm debet dominus tenenti, quantum tenens domino, præter solam reverentiam*.<sup>1</sup>

Homage was to be done at the time of the gift being made, either before or after seisin: if seisin was not delivered, the homage, says Bracton, had no effect.<sup>2</sup> Homage was to be done several times by the same tenant to the same lord, if for different freeholds. It was due for all lands, tenements, and rents; and for everything else which was held by any of the tenures before-mentioned.<sup>3</sup> Homage was not due for a tenement that was held only for a term, (which included an estate for term of life,) but *fealty* only. The person who was to do homage, says Bracton, was to seek his lord wherever he could be found; he was to approach him with reverence, and put both his hands between those of his lord: by which was meant to be signified on the part of the lord, protection, defence, and warranty; on the part of the tenant, reverence and subjection; and he was to pronounce in that posture these words: *Devenio homo vester de tenemento quod de vobis teno, et tenere debeo, et fidem vobis portabo de vitâ et membris et terreno honore, contra omnes gentes, salvâ fide debitâ domino rigi, et hæredibus suis*; which agrees in substance with the form in Glanville's time.<sup>4</sup> After this he was to take his oath of fealty, the form of which is not mentioned by Glanville, and is as follows: *Hoc audis, domine N. quodd FIDEM vobis portabo de vitâ et membris, corpore et catallis, et terreno honore: sic me Deus adjuvet, et hæc sancta Dei evangelia*. The difference between homage and fealty was this; that in the oath of fealty, which was the lesser obligation, the tenant engaged to bear his *faith* to his lord; in the other, he in addition thereto said, *Devenio vester homo*, that is, he became his *homager*.

Homage was not to be done in private, but in some public place, where everybody had access; as in the county or hundred court, or in the court of the lord, in the presence of many persons, that the lord might have witnesses of the tenant being bound to him. Again, it was requisite that a diligent examination should be made at the time, whether the person doing homage was entitled to the land; as whether he was right heir to the person last seised; what was the kind and size of the freehold; whether he held it in demesne, or in service; or what part thereof one or the other;<sup>5</sup> all which was to prevent either the lord or the tenant being deceived. The

<sup>1</sup> Bract. 78 b.<sup>2</sup> *Ibid.* 79.<sup>3</sup> *Ibid.* 79 b.<sup>4</sup> *Vide ante*, 123.<sup>5</sup> Bract. 80.

effect of homage was such, that this caution seemed highly necessary; for when a person had done homage to one who turned out not to be his true lord, yet he could not recede from the obligation of homage, without the judgment of some court, so long as he held the land for which he did it.

There were many ways in which the homage was dissolved: as, if either lord or tenant did anything to the disherison of the other; in the former case, the lord was to lose his *dominium*; in the latter, the tenant was to lose his tenement. Again, should the lord die without heirs, the homage on his part was gone, but it revived in the person of the next superior lord, and still continued in the person of the tenant: the same, if the lord committed felony. In these cases, the superior lord could not waive the homage which was to commence between him and the inferior tenant; for the tenant would then be deprived of his warranty. Besides, it might happen that by the feoffment the tenant was bound only to the service of a penny, while the superior lord was bound by the feoffment he had made to the mesne lord, to the warranty of a hundred librates of land; and there is no doubt but, in such case, a lord would gladly renounce his claim of homage, if the law would permit him. Nor would it avail the lord to say that the tenant was not infeoffed by him, and that he claimed nothing in the homage; for as there might be several superior lords, so there might be several tenants one below another; and the chief lord of all held the lowest tenant bound to him by the ties of homage, because he was within his fee, though *per medium*; and when that *medius*, or mesne lord was taken away for any cause whatsoever, the connexion between the chief lord of all and the inferior tenant became immediate; so that, one way or other, the inferior tenant was within the homage of the superior lord.<sup>1</sup> To illustrate this by an instance: if I infeoff *A.* and *A.* infeoffs *B.* and *B.* infeoffs *C.* and so on; then every tenant, from the first to the last, would be my tenants, and I their lord; the only difference being, that the first would be immediate tenant, the others so *per medium*.

We have been showing how the obligation of homage might cease in the person of the lord, and remain in the person of the tenant. In like manner might the homage cease in the person of the tenant and continue in that of the lord: as where the tenant parted with the whole inheritance, and infeoffed another to hold of the chief lord, then the tenant was absolved from the homage; that is, the homage was wholly extinguished as to him, whether the lord consented or not, and commenced in the person of the alienee, who now was bound to the lord; and should the feoffee re-infeoff the feoffor to hold of the same chief lord, the homage of the tenant would thereby be revived. The homage would cease also when the tenant died without heirs, or committed any felony; in which cases the tenement *escheated* to the chief lord. The tie of homage

<sup>1</sup> Bract. 80 b.



and fealty was likewise dissolved, when the tenant disavowed the services by which he held, or denied that he held of the lord at all; in which case the lord had two remedies: he might either waive the forfeiture of the tenement, and proceed for the recovery of the services; or avail himself of the tenant's default, and demand the tenement by a writ of escheat, or<sup>1</sup> by a writ of right. Should the tenant do any atrocious injury to his lord, or side with his enemy, by giving advice or assistance against his lord (except it was with the king, or the superior lord of all, to whom he had done allegiance), or do anything to the disherison of, or put violent hands on, his lord; all these were breaches of faith which dissolved the homage on the part of the tenant. It must be observed, that homage remained in force between lord and tenant as long as the heirs of both parties continued (which tenure was therefore, in after-times, called *homage auncestrell*); but upon the failure of any of them, the homage ceased, and could be revived in the persons of others only by some new cause. A tenant might decline holding his tenement, and so dissolve the homage: he might, says Bracton, also surrender the tenement and homage to the lord *propter capitales inimicitias*, and so dissolve the homage, that he might be at full liberty to prosecute an appeal against him.

It seems that, in general, the lord could not *attorn*, as they called it, or transfer to another the homage and services of his tenant against his consent, particularly the homage; for by so doing he might subject him to a person who was his declared and inveterate enemy. A slight enmity, however, was not an objection, where the law allowed, as it did in some cases, such an attornment even against the tenant's consent. The most usual way of attorning the homage, was, on a fine in the king's court, where the homager was to be summoned to show cause why the homage should not be done to the other person; and if he could not show sufficient reason to the contrary, it would be attorned without his concurrence.<sup>2</sup> There were other instances, where homage might be attorned; as when land was given in marriage; when land was sold for redemption of the lord's person; in both which cases it might be attorned, unless any particular reason could be shown to the contrary. This restraint upon the attornment of homage was founded on other reasons besides those before-mentioned; as homage was the bond by which the tenant claimed the warranty and *excambium* of his lord, it was right that the lord should not have the power of transferring this obligation to another, who might be indigent, and not able to answer the warranty. This restriction was wholly in favour of the tenant, for whose benefit, indeed, homage seemed principally calculated; and if it was just that a lord should not be at liberty to decline the homage of the tenant, it was equally so that he should not attorn it without his assent.

Although the law imposed this restraint as to homage, yet service

<sup>1</sup> Bract. 81.

<sup>2</sup> *Ibid.* 81 b.

might be attorned in all cases without requiring the assent of the tenant; and the person to whom it was attorned might distrain for it, without the tenant being able to make any resistance thereto.<sup>1</sup> In such cases, some thought, that should the distress be for the homage and service both, it ought to cease as to the homage, though it held good as to the service; distress being incident to service, and belonging of course to the person who was entitled to the service. Yet a tenant was not to be oppressed by an attornment of service, any more than by an attornment of homage; it was advisable therefore for the tenant, in order to secure himself from any unreasonable demands of his new lord, to get from him a charter, granting that he would not demand more services than were due, and charging himself with a warranty and *circumbium*, in the same manner as the first lord was bound.

If the lord refused to receive the homage, the tenant had several remedies. In the first place, the service, which the tenant was not bound to without homage, was lost to the lord; and should homage be forced upon the lord by a judgment of court, the arrears of service were still lost. If the homage was refused publicly by the lord, the tenant might attorn himself to the next superior lord; and if he refused, to the next; and so on to the king, who was the chief lord of all; and if they all refused, the tenant was quit of all demands for service. But should any of them accept it, the immediate lord who had refused it could never recover the homage or service; though he would, on account of his wilful refusal, be still bound to warranty, notwithstanding the person to whom tenant did homage had the service.<sup>2</sup>

When a mesne lord had accepted the homage and fealty of his tenant, and received the service, but had applied it to his own use without acquitting him from the demands of the superior, and this was proved in the presence of good and lawful men; he might, in future, without any breach of law, satisfy the chief lord with his own hands, by doing his service to him; and yet the mesne lord would not on that account be discharged from his warranty.<sup>3</sup> The remedy against the mesne lord, in such cases, was by a writ *de medio*.

After homage was performed, the next thing for the heir to do was to pay the relief; so called, says Bracton, because thereby the tenement and inheritance which was in the hands of the ancestor, *et quæ JACENS fuit per ejus decessum*, *RELEVATUR in manus hæredis*. The sums to be given on these occasions were settled by *Magna Charta*,<sup>4</sup> except in tenure by serjeanty, which was still left to the discretion of the lord.<sup>5</sup> A relief was to be paid only in cases of succession, and never upon a change of tenant by buying or selling, or any other sort of purchase.<sup>6</sup> It was to be paid to the next immediate lord, and no other: it was to be paid only once, and not upon the change of the lord; for though homage might be done several times, relief was to be paid only once;<sup>7</sup> so

<sup>1</sup> Bract. 82.

<sup>5</sup> Bract. 84.

<sup>2</sup> *Ibid.* 82 b.

<sup>6</sup> *Vide ante*, 125, 126.

<sup>3</sup> *Ibid.* 84.

<sup>4</sup> *Vide ante*, 235.

<sup>7</sup> Bract. 84 b.

that the doubts expressed by Glanville on this head no longer existed.<sup>1</sup> Another gift was to be made to a lord by the heir when he succeeded his ancestor, which was called a *heriot*. This was, however, in nothing like a relief; for it was given by all tenants, as well villain as free, and it rather came from the deceased than the heir: it was, says Bracton, when a man remembered his lord by the best beast, or second best beast he died possessed of, according to the custom of different places, and was rather *de gratiâ* than *de jure*; and, in fact, it related not at all to the inheritance.<sup>2</sup>

The subject of ward and marriage is treated by Glanville, and by Bracton, principally in the same way, and sometimes in the same words; we shall, therefore touch upon such parts only as are stated somewhat differently, or are discoursed upon more at large by Bracton.

The age of female wards was contended by some to be at fifteen years complete, both in military and socage tenure; for, as to the former, they said that she might have a husband who was able to perform the military service;<sup>3</sup> and therefore she might, with propriety, be reckoned of age before she was twenty-one years of age. But this opinion is combated by Bracton, who says, that the same principle might make her of age at an earlier period; and he therefore lays it down, that there is no distinction between male and female wards in the respective tenures; and that it was only in the latter that females, (as we have before shown of males,) were to be considered as of age at fifteen years; at which time, says Bracton, a woman is able to manage her domestic concerns;<sup>4</sup> which is a similar description to that given by Glanville,<sup>5</sup> and adopted by Bracton, of the qualification of an heir in burgage-tenure: and the latter author mentions fifteen as the proper age for the infancy of a tenant in socage to cease, because he was then able to attend to affairs of agriculture.

It is laid down positively by Glanville, that if a person married his daughter and heiress without the assent of his lord, he should forfeit his inheritance; and that a widow who married without her lord's assent, should in like manner forfeit her dower.<sup>6</sup> These two points are recognised by Bracton as remnants of the old law, which had gone out of use. We have before seen what notice was taken of this cruel piece of law by *Magna Charta*; and it was now laid down by Bracton, that in both cases the lord was only entitled to a penalty; the measure of which, however, he does not mention.<sup>7</sup>

When an infant succeeded to inheritances that were held of

<sup>1</sup> *Vide ante*, 125.

<sup>2</sup> Bract. 86.

<sup>3</sup> Bracton says, another reason was given in favour of this early liberation from pupilage: *Femina magis doli cupax est quam masculus, et maturiora sunt vota mulieris quam viri.*

<sup>4</sup> To this Bracton adds, that she might *habere COLNE et KEYE*; which is thus explained by Spelman: COLNE *Saxonice est CALCULUS*; KEYE, CLAVIS; *quasi ed spectaret hic locus, ut femina congrue ætatis haberetur, si COMPUTUM et CLAVES domesticas vateret curare.* Spelman, voce. Bract. 86 b.

<sup>5</sup> *Vide ante*, 114.

<sup>6</sup> *Ibid.* 116, 117.

<sup>7</sup> Bract. 88.

different lords, the custody of the lands belonged to the respective lords of whom they were held ; but the custody of the heir's person, and the marriage, which was the great source of emolument to the lord, could belong to one only ; and there was some difficulty in ascertaining who that person should be. It is laid down generally by Glanville, that this should be the chief lord of whom the heir held his first fee ;<sup>1</sup> and that the king, by his prerogative, was entitled to certain preferences. The manner in which both these claims were adjusted is more fully explained by Bracton.

As an exception to the prerogative, which gave to the king the custody of the heir and his lands of whomsoever they were held by knight-service, it is laid down, that if any held of the king *per feodi firmam*, or in socage, or in burgage, or by *serjeanty*, to perform the service of finding him knives, or darts, or the like, the king should not have custody either of the heir, or of the lands he held of any one else ; nor if he held of the king as of an honor or escheat ; it being provided by *Magna Charta*,<sup>2</sup> that the tenure in such case should remain the same as it was when in the hands of the former possessor ; though, even in case of escheats, if the heir held under a new grant from the king, the king's prerogative to wardship would prevail. This prerogative of the king, therefore, prevailed in respect only of a tenant who held of him *in capite* by military tenure, or by serjeanty to attend the king's person ; and it only extended to subject lands held by military tenure to the ward of the crown.<sup>3</sup>

In socage-tenure the wardship belonged to the next of kin, and not to the lord ; and therefore, in general, if an heir had inheritances held in socage of different lords, there could arise no question about priority of feoffment, to ascertain the right of wardship, as in military tenures ; though it is said by Bracton, that by special custom in some places, and amongst others in the bishopric of Winchester, the lord had the wardship in socage tenure, and in such cases, recourse must of necessity be had to priority to determine who was chief lord ; yet this preference was only against lords whose tenures lay within the reach of the custom, and not against other persons.<sup>4</sup>

The first fee, in many cases, which constituted a person chief lord, and gave him the priority, was the fee that was first *delivered* to the heir. The lord was not to receive homage before he had *delivered* the inheritance to the heir : the wardship and marriage could not be demanded from the infant heir, any more than relief, or any service could from the heir of full age, before homage ; the delivery, therefore, of the inheritance was the first step towards acquiring a right to the wardship and marriage, and the receiving of homage completed the claim. It follows from hence, that as long as the homage of the ancestor had continuance, no delivery was to be made of the inheritance, and that homage continued during the ancestor's life, unless he had made any transfer of the

<sup>1</sup> *Vide ante*, 115.

<sup>2</sup> *Ibid.* 238.

<sup>3</sup> Bract. 87 b.

<sup>4</sup> *Ibid.* 88.

land which broke the homage. Every transfer had not that effect. Thus, if a person holding by military service and homage, granted the land to his son and heir for life, to hold either of himself or of the chief lord, the homage still continued between the father and the chief lord; but it would have been broken, if the father had parted with the whole inheritance.

The ceasing of the homage and the delivery of the inheritance will be better understood by considering the following cases. Suppose *A.* having an inheritance, married *B.* having one also; both held of the same lord. They have a son. *A.* dies, leaving his wife *B.* alive: the inheritance of *A.* might be delivered to the heir by the lord, who would, in consequence, be entitled to homage, ward, and marriage. But if *B.* the wife had died, leaving *A.* alive, it would be otherwise; because the homage done by *A.* in the name of his wife still continued; for it could not be dissolved during his life, as he was entitled to hold the land *per legem Angliæ*: the heir of *A.* therefore continued in the power of the father, during whose life he owed no homage to the lord; as two homages could not be done for the same land. And so it was, wherever the heir was descended both from the husband and wife; but it was otherwise, where there was a second marriage, and he was descended only from one. As for instance, if the wife only had an inheritance, and the husband died first, leaving an heir, the inheritance could not be delivered during the life of the wife; and of course the lord would not have wardship and marriage: so if she married one or more husbands, there was still to be no delivery; and, of course, no ward or marriage, as long as she or any of her husbands lived: the same, if the wife died, leaving any husband alive: but as soon as the surviving husband died, then the inheritance might be delivered to the heir of the deceased wife by her first husband, and ward and marriage would follow.

Thus, as the preference depended upon the delivery of the inheritance, and that upon the death of the person in seisin, it might happen that the death of the husband and wife might fall so near as to leave a difficulty in determining which died first. In such case they used to recur, as in Glanville's time, to the first feoffment, and disregard the priority of delivery; and so they did, when the inheritance on the part of the father and that on the part of the mother were held of different lords, and were united in the person of one heir.<sup>1</sup>

The guardian in socage had the marriage of the heir and all other casualties and profits of wardship the same as the guardian in military tenure; and what is very remarkable, the right of the guardian in socage was so much considered, that the law allowed the *apparent* next of kin to take, notwithstanding he was a bastard and illegitimate.<sup>2</sup> This made a guardianship in socage as great an object as that in military tenure; and the struggle for the

<sup>1</sup> Bract. 89 b.

<sup>2</sup> *Ibid.* 88.

marriage of the heir did not lie only between the different lords of whom he held in military tenure, but, if he also held any socage lands, there might be a contest between the lord in military tenure, and the person who was entitled to be guardian in socage. When, therefore, land in military tenure descended from the father, and land in socage from the mother, or *vice versa*, and they both centered in the same heir, the marriage of the heir was decided, says Bracton, by priority, in the manner before-mentioned.<sup>1</sup> But if lands in socage and in military tenure descended from the same ancestor; then, notwithstanding the socage might be of the prior feoffment, yet the privilege of military tenure prevailed, and the lord of those lands would exclude the next of kin, and have the ward and marriage.<sup>2</sup>

Thus was the person of the infant heir made a property of, either by his guardian in chivalry or in socage: the disposal of the heir in marriage might be sold to the best purchaser, like the fruits and profits of his lands. We shall soon see,<sup>3</sup> that the legislature made some provision against this oppression, in the case of guardians in socage; but the others were rather secured in their rights by another provision of this reign, which made void all conveyances of the inheritance to the heir in the life of the ancestor; a practice by which tenants in chivalry endeavoured to avoid the claim of ward and marriage.<sup>4</sup>

Having considered the terms and conditions on which landed property might be held, the next object which naturally presents itself is, the manner of acquiring a title to property: and this was of three kinds; by *gift*, by *succession*, and by *will*. We shall consider these three in their order, beginning with the first.<sup>5</sup> A gift of land might be considered in various ways; either as, what is called by Bracton, *libera et pura donatio*, or that which was *sub conditione*; and, in another respect, such as was *absoluta et larga*, or that which was *stricta et contractata* to certain particular heirs, with an exclusion of others. These will be treated of more minutely hereafter, when we have first inquired what persons were capable of making gifts of land, and what not. †

The person who was regularly and properly entitled to make a gift of his land, was he who was seised in fee; but yet some others who had an inferior interest, could, to a certain degree, make a gift; as any one who had a freehold, though only for life; and even such as had no freehold; as one who had a term for years, or the wardship of land: and indeed those who had no lawful title; as one who was in seisin by intrusion or by disseisin, might, says Bracton, convey a freehold, though it was not a complete and indefeasible one. A gift made by a minor, or a madman, would be good, if confirmed, after the one was of age, and the other had become of sane memory.<sup>6</sup> Those who could not make a gift,

<sup>1</sup> Bract. 88 b.<sup>2</sup> *Vide post*, Stat. Marl.<sup>3</sup> *Ibid.* 91.<sup>5</sup> Bract. 10 b.<sup>3</sup> Stat. Marl.<sup>6</sup> *Ibid.* 11 b.

were such as had not a general and free disposal of their property: such was the condition of minors, who were *sub tutelâ vel curâ*; yet these could accept a gift with consent of their tutor, as the law allowed them to meliorate their condition, though not to lessen it by making a gift, even with consent of their tutor: the same of a person deaf and dumb; a person taken prisoner by an enemy, while in the enemy's custody; or a leper removed from the converse of mankind. Others were incapacitated *sub modo*. Thus archbishops, bishops, abbots and priors, could not make gifts without the assent of the chapter; nor the chapter without the assent of the king, or other patron, whoever he might be; the concurrence of all whose interest was concerned being absolutely requisite. Rectors of churches, as they possessed nothing but in the name of their churches, could make no alienation thereof but by consent of the bishop or patron;<sup>1</sup> nor even make any change therein for the better.<sup>2</sup> Bracton lays it down, that a bastard could not give his land unless he had heirs of his body, or he had made lawful assigns thereof, conformably with the terms of the donation. This restriction on the alienation of a bastard seems to have been imposed in favour of the lord, who, as the law now stood, (though it was otherwise in Glanville's time), would, on failure of heirs, succeed by escheat. For a similar reason no one charged with felony could alien his land with effect, though the gift would hold *till* he was convicted, and if he was acquitted would be valid. All gifts between a husband and wife were void;<sup>3</sup> nor could a husband give his land to another, to be conveyed by the donee to his wife in his life-time, or after his death, as that would be a fraud upon the letter of the law.

Thus far of the persons who might make a gift of land; next of those *to whom* a gift may be made. A gift, as has been before said, might be made to a minor; and in such a case, a *tutor*, or *curator*, used to be appointed to accept and take care of such gift; but the law did not allow the feoffor to appoint such tutor;<sup>4</sup> for that, says Bracton, would seem like a continuance of the seisin, instead of making a feoffment of it. A gift might be made to a Jew, unless the original charter had a clause which forbid such an alienation; it being very common in those days to add to the clause of assignment *exceptis viris religiosis, et Judæis*: it seems that Jews were not by law incapacitated from taking gifts of land, except in these particular cases.<sup>5</sup> If a gift was made by a man to his wife and his children, or her children begotten of another husband, the gift, though void as to the wife, would hold as to the others.

<sup>1</sup> So Bracton reads. Quere, if it should not be *and*?

<sup>2</sup> Bract. 12.

<sup>3</sup> *Vide ante*, 91-111.

<sup>4</sup> Bract. 12 b. It is to be regretted that Bracton has not informed us by whom he was to be appointed.

These terms of *Tutor* and *Curator* are borrowed from the civil law, and the appointment of them to protect property given to an infant is adopted from the same source. (Inst., lib. i., tit. xiii., *et sequent.*)

<sup>5</sup> Bract. 13.

It has before been said, that a person might give what he had in fee for life, or for years; to which may be added, that he had this power, whether he was seised to himself solely or in common with another. He might also give that which he had in expectancy after the death of his ancestor who held it in fee. He might give what he had granted before to another for a term of years, with a saving to the farmer of his term; because these two possessions could very well consist with each other, so as one should have the freehold and the other the term.

It has before been shown that these gifts might be of greater or less extent and duration; they might be in fee for life, in fee-farm for term of life or for term of years. Where a gift was for life, whatever the circumstances might be, the donee had immediately *liberum tenementum*, or, as it has since been called, a *freehold interest*, so as to have an assize if he was ejected; and such a donee might, as has before been said, make an imperfect donation in fee or for life; so great consideration did the law bestow on a freehold of any sort.<sup>1</sup>

To ascertain that gifts were actually made by the parties whose names were to the deed of gift, and that they were in a capacity to manage their affairs, a writ was framed requiring the sheriff to make inquisition whether the donor was *compos sui*; which writ was either to be executed before the sheriff and guardians of the pleas of the crown, or before the justices at Westminster.<sup>2</sup> There was another writ to inquire if it was the donor's seal, or was really affixed to the charter by him; and if, upon inquiry, any one was charged with a fraud respecting the gift, he was summoned to answer for it.<sup>3</sup> All gifts should be free, and without compulsion: and therefore should it be proved that any coercion was used with the donor, the gift was revoked; but if the donor dissembled the force, and did not complain of it till some length of time, he would not be permitted afterwards to invalidate the gift by such a suggestion. If it was in time of war, he was to make a declaration thereof as soon as peace was restored; if in time of peace, then, says Bracton, as soon as he had escaped from the duress, he was to raise a hue and cry after the parties; and in either of these cases, he would be considered by the law as having done all in his power.<sup>4</sup>

Having premised these observations concerning the capacity of persons to become donors and donees, the next subject is the donation itself. It has been said that donations Of simple gifts. were, some of them, simple and pure; that is, where no condition or modification was annexed. The following is a pure and simple gift of land, and, as it was the common form of gifts or feoffments at this time, is very well worthy of notice:—*Do tali tantam terram in villâ tali, pro homagio et servitio suo, habendam et tenendam eidem tali et hæredibus suis de me, et hæreditus meis tantum, ad*

<sup>1</sup> Bract. 13 b.<sup>2</sup> *Ibid.* 14 b.<sup>3</sup> *Ibid.* 15.<sup>4</sup> *Ibid.* 16 b.



*tales terminos, pro omni servitio, et consuetudine seculari, et demandâ; et ego et hæredes mei warrantizabimus, acquietabimus, et defendemus in perpetuum prædictum talem, et hæredes suos, versus omnes gentes per prædictum servitium, &c.* A gift like this, *tali et hæredibus suis*, was to be understood in the large sense of the term *hæres*, and as comprehending all heirs both near and remote.<sup>1</sup> Another way of enlarging this clause was, *tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit*, with a clause of warranty co-extensive with such a donation. In such case, if the donee assigned and died without heirs, the donor was bound to warrant the assignee, which could not be without such an express engagement in the deed of gift, so that the express mention of assignees seemed necessary to give a complete power of alienation.

As a gift might be made largely, so it might, as before stated, be *coarctata*, and confined to particular heirs, as, *tenendum sibi, et hæredibus suis* QUOS DE CARNE STA ET UXORE SIBI DESPONSATA PROCREATOS HABUERIT; or, *tali et uxori suæ*, or *cum tali filiâ meâ, &c., tenendam sibi et hæredibus suis de carne talis uxoris*, or *filiæ exantibus, &c.* In these cases the inheritance descended to the particular heirs there specified, to the exclusion of all others. If a person so infeoffed should infeoff any other, the heirs would be bound to warranty; for though some had endeavoured to maintain that they took together with their ancestor, yet Bracton denies it, and says, they only took by descent. And should the person so infeoffed have no such heirs, or they should fail, the land would revert to the donor by a tacit condition, without any mention thereof in the gift.

The construction of law upon the estate and interest of such donees was, that, in the first of the above cases, should there be no heir, the land given would be a freehold in the donee, but not a fee; in the second, it would be a freehold till heirs were born, and then it would become a fee; and when they failed, it would again become only a freehold. Thus, we see, it was at the pleasure of the donor, at the creation of the gift, to modify it as he pleased, however contrary to the general disposition the law would make thereof; in which instances the maxim, that *conventio vincit legem*, was the principle which governed; and this was not only in prescribing what heirs should inherit, but also in the service to be performed, which, as has been seen before, was in the breast of the feoffor to order as he liked, so as he warranted his tenant against the chief lords.<sup>2</sup>

We have hitherto spoken of the heirs that were pointed out by the will of the donor to succeed to the inheritance. We shall next take notice of the conditions and modifications under which the inheritance was to be enjoyed; and these imported sometimes a burthen, sometimes a benefit, to the donee, and were of different kinds. Thus a gift might be, *tenendum sibi*

Of conditional  
gifts.

<sup>1</sup> Bract. 17.

<sup>2</sup> *Ibid.* 17 b.

*et hæredibus suis, si hæredes habuerit de corpore suo procreatos*; where, if the donee had heirs of his body, though they afterwards failed, yet he had satisfied the condition, and all his heirs, without distinction, became entitled to inherit; but if no such heir had been born, the land given would have been only a freehold, and would return to the donor, to the exclusion of the heirs general, because the condition had not been fulfilled. If a gift was *viro et uxori, et hæredibus uxoris*; or, *vira et uxori, et hæredibus viri*; or, *viro et uxori et hæredibus communibus, si tales extiterint, vel si non extiterint, tunc ejus hæredibus qui aliam supervixerit*; these were all *sub modo*. Others were *sub modo*, and also *adjecta conditione*; as, *Do tibi tantam terram, ut det mihi tantum*; or, *ut mihi inveniat necessaria*. These gifts, though not wholly gratuitous, yet, Bracton says, were *simplex et pura*; and if livery was given thereon, they could not be revoked, though the condition was not performed, unless there had been an express covenant entitling the donor to enter for breach of the condition.<sup>1</sup>

The limitation of estates went much further than what has yet been stated. A person would make a gift to his eldest son *A. tenendum sibi et hæredibus suis de corpore suo procreatis*; and if he had no such heirs, or they should fail, then to his second son *B.* to whom he directed it to revert, to have and to hold to him in the same manner; and upon like failure to *C.*, his third son, in the like way, and so on; and if the said *A.* *B.* and *C.* all died without such heirs, the land to revert to the donor and his heirs; which last was unnecessary, as the law would, of course, give the reverter to him. Other gifts were as large as the former was confined; as *tenendum tibi et hæredibus tuis, vel cui dare, vel assignare in vita, vel in morte legare volueris*. A regard to the will of the donor induced them to support such gifts; for Bracton lays it down, that if the legatee got the seisin, and an assize was brought against him by the heir, he might plead the form of the gift, and it would be a bar,<sup>2</sup> so that the restraint upon gifts of land by will, which seemed one of the strictest points in the law of landed property, might be dispensed with by the special form of the original gift.

Innumerable were the conditions upon which gifts might be made. Some of these were conditions precedent, and some subsequent, to the vesting of the estate given: some of them were supported by law, and some not: and various were the reasons given why they should not be supported. A few instances of this kind will serve; as, *Do tibi talem terram, si Titius voluerit; si navis venerit ex Asia; si Titius venerit ex Jerusalem; si mihi decem aureos dederis; si cælum digito tetigeris*, and the like;<sup>3</sup> some of which were accompanied with an express condition of reverter on failure in performing the terms on which the gift was made, and some not.

The course of descent was entirely under the control of the donor

<sup>1</sup> Bract. 18 a. b.<sup>2</sup> *Ibid.* 18 b.<sup>3</sup> *Ibid.* 19.

in making the gift. A gift was sometimes made to a person for a term of years, and after that term to revert to the donor, with an agreement that if the donor died within the term, the land should remain to the donee for life, or in fee, as it might happen. Thus a freehold and fee might be raised by a condition, and in the same manner might be changed into a term; for when a gift was made for life, it might be added as a condition, that, should the tenant die within a certain time,<sup>1</sup> his heirs, tenants, assigns, or executors should retain the land for a certain term after his death. When land was given to a creditor *in vadium*, it was sometimes agreed, that if the money was not paid at an appointed day, he should hold it to him and his heirs. Gifts were often made for a term of years, yet so as to be restored to the donor if he ever returned into the kingdom; but if he died in his voyage, or did not return, to remain to the termor in fee; upon the performance of which condition the term ceased, and the fee commenced.<sup>2</sup>

In all gifts *in maritagium*, or to a *bastard*, there was an express or tacit condition of reverter. If land was given to a bastard in marriage with a woman, it was always either to them *et hæredibus eorum communibus*, or, *hæredibus ipsius uxoris tantum*. In the former case, there was, by a tacit condition in the gift, a reverter to the donor, upon failure of common heirs; in the latter, if she had heirs by the bastard, the land went to them; if she had none, it descended to other heirs of the wife, whether born of another husband or collateral. Suppose land was given to a bastard solely, without his wife, *ei et hæredibus suis*, or, *ei et assignatis suis*; in the former case, upon failure of heirs, whether homage had been done or not, the land, contrary to the usage in Glanville's time,<sup>3</sup> escheated for want of heirs; in the latter, if he had made an alienation, it was good, though there was a failure of heirs.<sup>4</sup> If a bastard had a brother, that brother could not take from him by descent.

Land was sometimes given before the espousals by some relation of the wife to the husband with his wife, or to both of them; as, *tali viro et uxori suæ, et eorum hæredibus*, or *alicui mulieri ad se maritandum*; or simply without any mention of marriage; but if there was mention of marriage, then the land so given was called *maritagium*. A *maritagium* used to be given either before, or at the time of, or after, the matrimonial contract. *Maritagium* was, as has been said before,<sup>5</sup> of two kinds, it was *free*, or *not free*; the particulars of which distinction were now more minutely set forth than in the time of Glanville. *Liberum maritagium* was, where the donor was willing that the land should be quit and free from all secular service<sup>6</sup> belonging to the lord of the fee, so as to perform no service down to the third heir inclusive, and the fourth degree. The degrees were computed in this way: the donee made the first, his heir the second, his heir the third, and the heir of the second

<sup>1</sup> Bract. 19 b.<sup>4</sup> Bract. 20 b. *Vide ante*, 290.<sup>2</sup> *Ibid.* 20.<sup>5</sup> *Vide ante*, 121.<sup>3</sup> *Vide ante*, 119.<sup>6</sup> Bract. 21.

heir the fourth. The heirs were computed thus: the son or daughter of the donee was the first, the son or daughter of them the second, and their son or daughter the third, which third heir was to do homage and perform the service. As there was a reverter to the donor, on failure of heirs, there was to be no homage in these gifts; but should those in the right line fail, the land would go to the remoter heirs, if the form of the gift allowed it.<sup>1</sup>

These gifts were made in different ways. If land was given *tali filie mee ad se maritandum*, without mention of heirs, this conveyed only a freehold and not a fee; and therefore, after the death of the wife, it reverted to the donor; nor had the husband any claim upon it *per legem Angliæ*.<sup>2</sup> If it was *ad se maritandum, et tenendam sibi et hæredibus suis*, generally; then, though she had no heirs of her body, the remoter would be called in, and the husband would possess it *per legem Angliæ*. If it was confined to particular heirs, it reverted on failure of such heirs. Thus, if it was to the common heirs of the husband and wife, and they had a daughter, and the husband died, and the widow married again and had a son, the daughter would be preferred to the son; though it would be otherwise had the gift been to the wife only, and the heirs of *her* body.<sup>3</sup>

The right of a husband to retain the land of his deceased wife *per legem Angliæ*, is defined by Glanville and Bracton in the same manner, except that the former<sup>4</sup> states it as if confined to estates given with the woman *in maritagium*; if so, this claim had now extended itself, for Bracton says, the husband should have the land if he married a woman *habentem hæreditatem, vel maritagium, vel aliquam terram ex causâ donationis*, having any inheritance, whether a *maritagium* or other gift of land.<sup>5</sup> He agrees likewise with Glanville, that the second husband was equally entitled with the first. It seems, one *Stephanus de Segrave*, whose name we find among the justices itinerant in this reign, had written a treatise, in which he had combated this opinion, as founded on a misconception of the meaning and design of this sort of estate. He thought there was an injustice in giving an estate *per legem Angliæ* to the second husband, more especially when there were children alive of the first marriage.

The crying of the child, which was a necessary circumstance towards establishing a title to this estate, was to be proved *per sectam sufficientem*, consisting of persons who heard with their own ears the cry, and not by those who had it by hearsay. The cry was only an evidence of the child being born alive; but this evidence was more regarded than any testimony of midwives or nurses, who might be induced, by various motives, to give false testimony; and no proof of the child being born alive, and christened as such, would be received in lieu thereof. So rigid

<sup>1</sup> Bract. 21 b.<sup>2</sup> Bract. 437 b.<sup>3</sup> *Ibid.* 22 b.<sup>4</sup> *Id. ibid.*<sup>5</sup> *Vide ante*, 122.

were the lawyers of those days in exacting this only proof of life, that where the child was born deaf and dumb, they pronounced, *tamen clamorem emittere DEBET, sive masculus sive femina* ; which expectation had been thrown by the lawyers of those days into a singular monkish verse.<sup>1</sup> If the child was a monster, and instead of a *clamor* uttered a *rugitus*, as Bracton expresses it, it would not satisfy the requisite of the law much less would a birth that was supposititious.<sup>2</sup>

The tenant *per legem Angliæ* was to have all incidents that happened, whether in services, wards, reliefs, or the like, during his life ; but if any land, or inheritance, fell in after the death of the wife, such accession went to the heir, if of age ; if not, to the chief lord who had custody of him ; as likewise did the wards and the like ; it being a rule, that the husband should retain nothing that did not accrue in the lifetime of the wife.

Among other impediments to the husband claiming this estate, Bracton reckons that of having *machinatus in mortem uxoris* ; and this, he says, would be a good plea to bar him of his right. If no heir was born of the marriage, and the husband held possession by force, after the death of the wife, the next heir might have the following writ, which is recorded to have been framed for one *Ranulphus de Dadescomb* by *W. de Ralegh*, a name often found among the justices of this period. *Rex vicecomiti salutem. Ostendit nobis A quòd cum B. et C. uxor egus tenuissent tantam terram, &c., ut jus, et hæreditatem ipsius C. quæ nuper obiit sine hærede de corpore suo procreato (ut dicitur), unde terra illa descendere debuit ad prædictum A. sicut ad propinquiorem hæredem ipsius C. quia prædicta C. sine hærede de corpore suo procreato decessit ; idem B. post mortem prædictæ C. uxoris suæ contra legem et consuetudinem regni nostri cum vi suâ se tenet in eadem, ita quòd prædictus A. in prædictam terram, ut in jus et hæreditatem suam, ingressum habere non potest. Et ideo tibi præcipimus, quòd si prædictus A. fecerit te, &c., tunc summonneas, &c., prædictum B. quòd sit coram justitiariis, &c., ostensurus quare deforceat eidem A. prædictam terram, et habeas ibi, &c.,*<sup>3</sup> which seems to be the most simple form of a writ of entry ; a species of writs which had lately grown into vogue, and of which more will be said in the proper place.

Having said thus much of estates which reverted to the donor upon a condition expressed or implied, it may be requisite to consider the effect and consequence of such a reverter or reversion.

Of reversions.

The reversioner, says Bracton, was considered neither *pro hærede* nor *loco hæredis* ; nor was he bound to warrant anything done by the donee, except the appointment of dower ; and this only where the donation was pure, without any condition or modification whatever. Land reverted not only for a failure of

<sup>1</sup> The verse is as follows :

*Nam dicunt e vel a quotquot nascuntur ab Era.*

<sup>2</sup> Bract. 438.

<sup>3</sup> *Ibid.* 438 b.

heirs or assigns; but in case of felony committed by the tenant, which threw a perpetual impediment in the way of descent; in which instance, it might happen that the donor had made a reservation of the services to himself, which made him lord, and then he took it as an escheat. In such case, he was deemed *in loco hæredis*, and was accordingly bound to warrant whatever was completed by the donee before the felony; as any gift or demise for a term, provided the act was complete; for if it was not, as, from the nature of the thing, was the case in dower, it would not avail after a conviction for felony: nor was the donor, though he came *in loco hæredis*, bound to warrant it.<sup>1</sup>

We have hitherto been speaking of estates given to a man and his heirs; but land was sometimes given *ad terminum* Gifts *ad terminum* or *ad tempus*, for a term; as for a<sup>2</sup> term of life, or years; that is, the life of the grantor, or grantee: or for a time; as where a gift was "till provision was made for the donee." In gifts of this kind it was important whether there was only mention that the donor should make provision, without saying anything of his heirs, or both the donor and his heirs were included; and whether it was to be for the donee only, or the donee and his heirs. If the donor's heirs were not included, and no provision was made in the life of the donor or donee, the land remained in fee to the donee; but if provision was made in their lives, the land reverted to the donor by the form of the gift. If the heirs of the donor only were included, and not those of the donee, and neither the donor nor his heirs provided for the donee in his life, the land remained to the donee and his heirs in fee, although the heir of the donor or the donor himself was ready to provide for the heirs of the donee, after the donee's death. But if, on the other hand, the heirs of the donee and those of the donor were mentioned, and the donor provided for the donee, or his heirs, the land reverted to the donor; and should the donor have made no provision in his lifetime, it was not sufficient that his heirs were ready to do it, because the form of the gift required it to be otherwise. If there was no mention of heirs at all, then should the donor make no provision for the donee during their joint lives, the law was, that the land should remain in fee to the donee. If land was given for the life of the donee, and not of the donor, nor in fee, then it was considered as a freehold in the donee: if the reverse, then the law considered it as the freehold of the donor, and not of the donee, because it might, if the donor died first, be revoked in the life of the donee, and revert to the heirs of the donor. Again, if a gift was made for the life of the donor to the donee and his heirs, then, should the donee die first, his heirs would hold it for the life of the donor, and they could recover in an assize of mortdancestor, stating that

<sup>1</sup> Bract. 13.

<sup>2</sup> This was called a holding *ad firmam*, and the persons so holding were called *firmarii*. *Fermo*, in the Italian, signifies a bargain or contract.

their ancestor died seised *as of fee*:<sup>1</sup> and if the donor died first, then, for the reason above given, it became the freehold of the donor and not of the donee. If there was no mention of heirs of the donee, yet the land needed not immediately, in such case, revert of course to the donor; for the donee might, if he pleased, make a testament of it, as of any chattel; and such a will, according to Bracton, was good in law.

If a gift was made by a man for him and his heirs without naming the heirs of the donee, and without saying expressly it should be for life, yet the land became the *freehold* of the donee as long as he lived. But should a gift be made *ad terminum annorum*, for a term of years, however long, even though it exceeded the usual length of man's life, yet the donee did not by such a gift obtain a *freehold*; because a term of years was a certain and determinate period, and the term of life uncertain; the uncertainty of the determination of the estate being what Bracton seems to consider as absolutely necessary to constitute a freehold interest. A term of years was treated as an interest that did not at all impede any further disposition of the land so held; for the person who let it, might within the term make a gift of the land to another, or to the same person in fee. If it was to the farmer, one sort of possession would thus be changed into another; if to another, the possession of the farmer would still remain unimpaired; for a term and a feoffment of the same land might consist very well together. In such case, there would be different and distinct rights. To the feoffee would belong the property of the fee and the freehold; the farmer could claim nothing but the usufruct—that is, to enjoy the use and produce freely during his term, without any obstruction from the feoffee.

Land, says Bracton, might be given *at the will* of the giver, and so on as long as he pleased, *de termino in terminum*, and *de anno in annum*; under which lease the person taking had no freehold; the owner of the *proprietas* could at any time reclaim it, as being nothing in law but a precarious possession (a).<sup>2</sup>

Another sort of gifts was to cathedral, conventual, and parochial churches, and religious men. These were said to be *in liberam elemosynam*. They were sometimes *in liberam et perpetuam ele-*

(a). This is mere verbal quibbling on the part of Bracton, evidently with a view to the controversies of the age as to the control of the crown over bishoprics. No such distinction is drawn in Glanville, who states broadly that the bishops held their baronies in frankalmoine (lib. vii. c. 1). So the *Mirror* says that when lands were originally allotted, some received their lands without any obligation of service, as frankalmoine (c. 2, s. 28). So Littleton, writing *temp.* Henry VI., says that where a man gave lands to an abbot, &c., to hold to them and their successors (whether he said in pure and perpetual alms, or in "free alms," or in frankalmoine), the land would be held in frankalmoine, evidently meaning that the essence of it was a gift to the ecclesiastical person and his successors, which is common sense. It is not likely that men would ever draw such senseless distinctions as Bracton here affects to draw. Littleton says distinctly that tenants in frankalmoine owe no service to their lords. And that was the law laid down by Glanville.

<sup>1</sup> Bract. 26 b.

<sup>2</sup> *Ibid.* 27 b.

*mosynam*; in which cases, the donee was not excused from the burthen of service: but if the gift was what they termed *in liberam puram, et perpetuam elemosynam*, then he was; and the donor and his heirs were bound to warrant the donee against all claims of the chief lord.<sup>1</sup>

The next subject is the consideration the law had of the several before-mentioned gifts; all which were imperfect, till possession or seisin was given to the donee. The Livery. degrees of possession made a subject of very minute distinction and refinement at this time, and is discoursed on by Bracton<sup>2</sup> at length. It is sufficient to say, that the completest possession which could be had, was, when the *jus*, and *seisina*, the title to the land, and the seisin of it, went together; for the donee had then *juris et seisinæ conjunctio*; the highest of all titles.<sup>3</sup> But this could not be obtained without a formal *traditio*, or *livery*; for land was not transferred by homage, nor by executing charters or instruments, however publicly they might be transacted, but by the donor giving full and complete seisin thereof to the donee, either in person or by attorney. This was by publicly reading the charter (and if livery was made by attorney, by reading the letters of attorney) in presence of the neighbours, who were called together for that particular purpose; upon which the donor retired from the possession, both *corpore et animo*, without any intention of returning to it as lord; and the donee was put into the vacant possession, *animo et corpore*, with a resolution of retaining possession; in short, one party ceased, and the other began to possess it: for the donor never ceased to possess till the donee was fully in seisin; it being a rule of law, that the seisin could not remain vacant for the minutest space of time. This is the account given of livery by Bracton, who adds this definition of it: *de re corporali de personâ in personam de manu propriâ vel alienâ* (that is, of an attorney) *in alterius manum gratuita translatio*. And if livery was thus made by the true owner of the land, the donee had immediately the freehold by reason of the *juris et seisinæ conjunctio*.<sup>4</sup>

There were some cases where livery was not necessary, and any expression of the owner's will, that the property should be changed, had the same effect as livery. Thus, where land was let for a term of life, or years, and afterwards the donor sold or gave it wholly to the donee, it became the property of the donee immediately: the same where a person was in possession by disseisin or intrusion;<sup>5</sup> the law allowing, in these cases, a fiction to supply the fact of the land having really passed out of one hand into the other.

When a livery was made, it had the effect of conveying to the person to whom it was made, everything the maker of it had: whether he had a mere right and property of the fee, a freehold, or usufruct, it all belonged to the donee. But for this purpose, it was

<sup>1</sup> Bract. 27 b.<sup>2</sup> *Ibid.* 38 b.<sup>3</sup> *Ibid.* 39 b.<sup>4</sup> *Id. ibid.*<sup>5</sup> *Ibid.* 40 b.



not sufficient that the donee came into the occupation of part of the land ; for if any person belonging to the donor remained on another part, he thereby retained the whole, notwithstanding the livery : and it was absolutely necessary towards completing the livery, that the donor and every one belonging to him should leave the land. If the person making livery had only the usufruct, yet he thereby gave to his feoffee a freehold, as far as concerned himself, and all others who had no right, though *not* as against the true owner. If he had nothing, nothing he could give ; yet if a person was only in possession, let that be as inferior as might be, it is clearly laid down by Bracton, that he could give a *precarious* fee and freehold by livery.<sup>1</sup> As livery might be made either by the donor in person or his attorney, so it might be accepted either by the donee or by his attorney.<sup>2</sup>

Land might be transferred not only by a legal title, and livery thereon, but without title or livery at all, namely, *per usucaptionem* (a) ; that is, by continual and peaceable possession for a length of time ; yet what length of time was necessary to give such a right, was not defined by the law, but was left to the discretion of the justices.<sup>3</sup> Thus all intruders, disseisors, farmers holding over their term, persons continuing in possession contrary to a covenant or the original form of the gift, if they were suffered to remain in that condition without any interruption for a length of time, gained a right and freehold. Though this was the law amongst subjects, in order to avoid dormant and litigious claims, yet in the case of the king it was otherwise ; the maxim of *nullum tempus occurrit regi* having already obtained in his favour.<sup>4</sup>

We have hitherto been speaking of *corporeal things*. It follows, that something should be said of *incorporeal*, and the methods of transferring them. These were called *jura* and *servitutes*, or *rights* : and being things neither visible nor tangible, could not pass by livery : they therefore passed by agreement of the parties contracting,<sup>5</sup> and by a view of the corporeal thing to which they belonged ; thus, by a fiction of law, they became what was called *quasi*-possessed ; and he who was so in possession by fiction of law, had a *quasi*-use till he lost the possession by violence or by non-user ; for as possession of a corporeal thing could be lost by non-user, so could a *quasi*-possession of an

(a) This head of law, and the very term used to describe it, *per usucaptionem*, are borrowed from the Roman law ; and, it may here be observed, that by far the greater portion of Bracton's treatise, so far as it relates to private civil rights, is taken from that source, and is, as Sir William Jones said, borrowed from Justinian. The phrase used by Bracton is, "longa pacifica, et continua possessio (p. 52), quia sicut tempus est modus inducendæ, et tollendæ obligationis, ita erit modus acquirendæ possessiones longa enim possessio (sicut jus), parit jus possidendi, et tollet actionem vero domino, petenti quandoque omnem quia omnes actiones in mundo infra certa tempora habent limitationem" (p. 53).

<sup>1</sup> It is worthy of remark, that this piece of old law was reconsidered, and after long discussion confirmed, 500 years after Bracton wrote, in a famous case in the King's Bench. *Vide Burr. Rep.* 60.

<sup>2</sup> Bract. 41 b.

<sup>3</sup> *Ibid.* 51 b.

<sup>4</sup> *Ibid.* 52 and 103.

<sup>5</sup> *Ibid.* 93 b.

incorporeal thing. But when there was an actual user of an incorporeal thing, the possession was retained by the user, and became real, instead of fictitious: and when a person had thus made use of his right, he might transfer the right and the use to another, which before user he could not. If a person, however, who had an incorporeal right to him and his heirs, died without any user thereof, the title would descend to his heirs.

These rights were generally considered as, and were called *appurtenances* to some corporeal thing, as to a farm or tenement; and were commons, rights of advowson, and the like.<sup>1</sup> An advowson and common were sometimes not appurtenant to anything, but subsisted as independent rights.<sup>2</sup> Of a nature similar to these were other incorporeal things, which were given by the king only, as liberties and franchises; such as jurisdiction and judicature, treasure-trove, waifs, tolls, exemption from tolls, and numberless other royalties, which were granted by charter from the king to the subject.<sup>3</sup>

Besides the gifts above mentioned, which, being transactions between man and man, were to take effect immediately, there was another sort, which was to take effect after the donor's death: such a gift was called *donatio mortis causa*. A gift of this kind was generally made by a person in sickness, or going upon a voyage, and had in it a tacit condition, that it should be revocable upon the recovery or return of the giver. Should a gift not be accompanied with this condition, it was a *donatio inter vivos*; and therefore, if made between husband and wife, was void. A *donatio mortis causa* was confirmed by the death of the giver.

The principal gift of this kind was by testament; and this did not take place till after the death of the giver.<sup>4</sup> The whole law of testaments stated by Glanville, is delivered by Bracton as law, and sometimes in the very words of that author; it will therefore be unnecessary to do more than notice such parts as are more explicitly treated by Bracton, together with such additions as he has made to Glanville's account.<sup>5</sup> He says, that, generally, a wife could not make a will without the consent of her husband; yet that it had been usual (as was intimated by Glanville)<sup>6</sup> for the wife to make a will of the *rationabilis pars* which would come to her if she survived her husband, and particularly of such things as were given her for the dress and ornament of her person, as her clothes and jewels, all which might most properly be called her own.

Glanville says, that the administration of intestates' effects belonged to the nearest of kin; but Bracton says, that in such case, *ad ecclesiam et ad amicos pertinebit executio bonorum*. The law upon the subject of testaments is thus laid down by our author. The expenses of the funeral were to be allowed out of the effects, and the widow was entitled to receive all necessaries thereout till

<sup>1</sup> Bract. 54.<sup>2</sup> *Ibid.* 54 b.<sup>3</sup> *Ibid.* 55 b.<sup>4</sup> *Ibid.* 60.<sup>5</sup> *Vide ante*, 80.<sup>6</sup> *Ibid.* 111.

her quarantine was expired, unless her dower was assigned before. If the deceased left no movables, the heir was to be burthened with all the debts,<sup>1</sup> as far as the inheritance went, and no further. There were particular customs which directed a disposition of the effects somewhat differing from the general law: this was in some cities, boroughs, and towns. Among these, the city of London had a custom, that when a certain dower was appointed, whether in money or other chattels, or in houses, which were considered as chattels, the widow could demand nothing, beyond that, out of the effects, unless by the special favour of the husband, who might leave her more: and again, the children could not demand, by pretence of any custom, more than was left them by testator, if he made a will. Bracton says, that a man could not make a will of a right of action, nor of debts not judicially ascertained; but that actions for such things belonged to the heir: yet, when these were once reduced into judgments, they became part of the *bona testatoris*, and belonged to the executors, under the direction of the ecclesiastical court<sup>2</sup> (a).

Whatever doubt there might have been whether the ecclesiastical court entertained suits for the recovery of legacies in the time of king John,<sup>3</sup> it is beyond a question, that in the beginning of Henry III. that branch of jurisdiction was firmly settled.<sup>4</sup> It is probable, that legacies were a subject *mixti fori*, in the same manner as tithes long were, before they became entirely confined to the spiritual court; but it appears that the temporal courts in this king's reign so far gave up their claim, as not to prohibit the ecclesiastical judges. This article of jurisdiction might be thought not a very unlikely consequence to follow from the power of granting *probates*; but it is conjectured by a canonist of great authority,<sup>5</sup> that it took its rise out of those laws in the code which made the bishop protector over legacies given

(a) A far more natural and probable explanation is, that the jurisdiction as to probate of testament came to the ecclesiastical courts, simply for this reason, that in the age in which it arose, few persons could read or write except ecclesiastics; and the jurisdiction in cases of intestacy came to be joined with it, for reasons equally obvious, that it was very much mixed up with the former; that it often involved a question of testament (for, of course, if a testament was invalid, the case was one of intestacy), and also because the division of the effects and the appropriation among the next of kin in due order and proportion, were matters rather beyond the laity in an age when they were ignorant and unlettered. This view is supported by the fact that in many manors the jurisdiction was by custom vested in the lords, no doubt in some cases because they were ecclesiastics, but in others, there can be as little doubt, because they were lettered laymen. The notion that the jurisdiction arose from the canon laws, which vested in the bishops the distribution of bequests left for pious uses, took its rise in an age when prejudices against everything ecclesiastical often suggested inferences not supported by any authority; and it will be found upon reflection untenable, because there it does not account for the fact that the jurisdiction was often in lay lords; and it overlooks the fact that the bishops held only canonical jurisdiction over the portion left for pious uses, which could not be available until all debts were satisfied (this being a just principle of canonical, not less than common law),

<sup>1</sup> Bract. 60 b.

<sup>2</sup> 4 Hen. III. Tit. Pro. 13.

<sup>3</sup> *Ibid.* 61.

<sup>4</sup> Lindewoode.

<sup>5</sup> *Vide ante*, 72.

*in pios usus.* It is consistent enough with the usual practice of churchmen in particular, and conformable with the inclination of

so that the jurisdiction, according to the canons, could not arise until the estate already was in a great degree administered; and further, this view in question does not account for the fact that the jurisdiction was often in laymen. It is surprising that our author should here appear to represent all this as a mere novelty or innovation, since in chapter iii. he had already fully quoted Glauville, who showed that it was the law in his time, viz., that it was well understood that a man could bequeath nothing to anybody until his debts were paid; and that, even after satisfying debts, the "reasonable" part was still due to the wife and children, or next of kin; and that the administration was in the next of kin, except as to what was left to pious uses. He says distinctly that this was so in the case of a man leaving a will, but appointing no executor, which is a case of intestacy; and, he says, the law gave a remedy to the next of kin against any person holding the effects of the deceased. "If he should not nominate any person for the purpose, the nearest of kin and relatives of the deceased may take upon themselves the charge, and this so effectually, that should they find the heir or any person detaining the effects of the deceased, they should have the king's writ, and that justly and without delay the reasonable division should be made" (*Glauville*, lib. vii. c. 6-8). Nor can there be any doubt that it was so in any other case of intestacy: that is, that if the bishop or any ecclesiastic should be so unwise as to meddle with the goods before the debts were satisfied, and also the "reasonable division" in favour of the relatives, they might recover from him the effects, and make the distribution. It is clear, therefore, that the bishops could have no concern except with the portion left to pious uses, and that nothing could be applied to such uses until the debts and the relatives were satisfied. On the other hand, it is also equally clear that the law had always been, after satisfying the debts and "reasonable share" of relatives, the residue was understood to be for pious uses. For, in the laws of Henry I., it was laid down clearly that the first charge upon the effects of the deceased were his debts: "*Si quis debitor moriens testamenta aliqua fecerit, quicunque in hereditatem successerit, omne debitum ejus juste restituat et omne factum idoneare student*" (*Leges Henrici Primi*, c. 75); while, at the same time, it was laid down that the residue of the goods of an intestate, after a proper distribution and satisfaction of debts, were for the benefit of his soul, "*Si ipse preventus pecuniam suam non dederit, uxor sua, liberi aut parentis, aut legitimi homines ejus eam pro anima ejus dividant, sicut eis melius usum fuerit*" (*Ibid.* c. i., Charter of Henry I.). Thus the law in effect was stated by Glauville (*temp. Hen. II.*), for he says that so far as a man was indebted, he could not leave anything; but if he were not involved in debt and died intestate—then after satisfying claims of creditors and relatives—the residue would be received for himself (lib. vii. c. 5), which of course meant, in that age, for his soul, since that was the only way in which goods could be for the benefit of a dead man. But he expressly states that if the deceased was overburdened with debts, he could not, beyond the payment of his debts, make any disposition of his effects; but should it happen that anything remained, then it was distributed and applied as above stated. He says nothing about ecclesiastical jurisdiction in cases of intestacy, obviously because it was only incident to testament, and because ecclesiastics had only to grant administration, save as to the portion in pious uses. According to this law, the distribution would take place under the joint guardianship of next of kin, and of the church, or by the next of kin under the care of the church; and so the charter of John provided that if any freeman shall die intestate, his goods shall be distributed by the next of kin, and by the view of the church (c. 27), which did not therefore alter, but only declared the law. That was left out in the subsequent charters, but the law remained as it had been before, and perhaps it was omitted as unnecessary. It is manifest that the ecclesiastical courts had no power, except to adjudicate as to whether there was a testament, and, if not, then to grant administration, or appoint persons as next of kin to administer. It is plain they must have been next of kin, or the next of kin could (unless the distribution was duly carried out) recover the effects by law (*vide supra*); and the administrators being next of kin, would, it is certain, look after their own interests, and protect the assets for creditors or for themselves, it being clear law, according to Bracton, that whoever took the assets was liable to the debts, as far as the assets went, "*Quatenus ad ipsum pervenerit, scilicet de hereditate defuncti, et non ultra*" (61 a, *Fleta*, lib. ii. c. 57, s. 10). It might, however, indeed happen, that goods left to the church by a person solvent, though indebted, and therefore

courts (*ampliare jurisdictionem*), to suppose that the ecclesiastical court might have gradually gained jurisdiction over all personal legacies under colour of such as were given *in pios usus*.<sup>1</sup> This might have been the first step towards it; but it is most probable, that there was a direct authority for this innovation derived from the canon law. For although the *Decretals*, where it is set forth as a general law, were not published by Gregory IX. till the 24th year of Henry III., the canon which warrants this point of judicature was much more ancient, and, without doubt, had travelled hither long before the collection of Gregory was made; and the authoritative promulgation by that pope, might give new sanction to a usage which had obtained some time before.

The granting administration of intestates' effects by the ordinary, though established on a more solid foundation, the express law of this country, by the charter of king John and confirmed by that of Henry III.<sup>2</sup> did not prevail universally. It seems that lords in some places, in maintenance of their former right, still exercised some jurisdiction in the disposition of intestates' goods, in opposition to the authority of the bishops. The power hereby intrusted to the bishops was abused in a very shameful manner; for instead of liable to debts, might come into the hands of ecclesiastics, and it might be convenient that they should administer, and satisfy the debts and the relatives; but they were bound to do so, and then administration was jointly with and under the eye of the next of kin. It might be that in some cases they were dilatory (as administrators usually are), but there could be no doubt of their legal liability to the next of kin. It is said in *Pleta* (c. 57, De Testamentis, s. 10), "Item si liber homo intestatus decesserit, et subito dominus suus nihil se intromittet de bonis suis, nisi tantum de hoc quod ad ipsum pertinerit, scilicet, quod habeat suum Heriotum, sed ad ecclesiam et amicos pertinabit executio. [Sed quid ordinarii hujusmodi dona nomine ecclesiarum occupantes, nullam vel saltone indebitam faciunt distributionem, ideo provisum fuit quod hujusmodi ordinarii de debitis defuncti satisfacerent, quatenus bona et facultates sufficerent], nullam enim pœnam meretur, quamvis intestatus decedat; postea verò deduci debent debita aliorum quæ clara sunt et recognita, inter quæ connumerari poterunt servitia servientium et stipendia famulorum; dum tamen certa sint, si autem incerta sint, &c." (*Selden's Pleta*). This passage is to be found word for word in Bracton (p. 16), except the words enclosed in brackets, which are introduced into *Selden's Pleta*. It is to be noted that Bracton, while mentioning customs to leave something to the lord and the church, distinctly states that the heir is bound to pay the debts, and that no one is bound to give anything to the church: "Et quâvis non teneretur quis aliquid dare ecclesiæ suæ, nomine sepulture tamen cum consuetudo illa laudabilis existat, dominus Papa non vult eam infringere, post quam vero quam ecclesiam suam ea recognoverit, deinde parentis et alias personas," &c. (*Bracton*, 61). Again he states that the representatives are bound to pay the debts, and then comes the above passage. But that ecclesiastics ever could, according to the canon law or any other law, appropriate the assets of the deceased, without first satisfying debts and legal liabilities, including just claims of relatives, is absurd. Neither had the law ever been altered in any way up to this time, nor was it altered after this time, however it may have been on some points aided and enforced, as, for instance, by giving creditors legal remedies against the next of kin administrators. At common law the administrators or next of kin had ample legal remedy against the ecclesiastics, or any one withholding the assets; but the law gave no remedy against the administrators or next of kin, so that, as regarded them, it was only a matter of conscience to be enforced in the ecclesiastical courts. Hence the necessity for alteration of the law in that respect, as against administrators.

<sup>1</sup> 3 Seld. 1675.

<sup>2</sup> This clause, as before observed, was left out of the *Insperimus*, 25 Ed. I., and so is not in the common printed charters.

taking order for a due distribution of such goods, when they had once got possession of them, they committed the administration of them to their own use, or the use of their churches, and so defrauded those, to whom, by right of succession, they belonged; and this they did with the pretence of law and conscience on their side, affecting that this disposition of them *in pios usus* very fully satisfied the requisition of law (a). This practice grew to such a height, as to occasion a constitution in this king's reign, enjoining that they should not dispose of them otherwise than according to the Great Charter, that is, to the next of kin (b); notwithstanding which, the practice still continued, and the right of succession was, by degrees, in a manner altered. It was even stated by the canons, as the law of the land,<sup>1</sup> that a third part of intestates' effects should be distributed for the benefit of the church and the poor<sup>2</sup> (c); which was in effect the whole that properly belonged to the intestate, after the *partes rationabiles* of the wife and children. These

(a) It will be observed that for all this there is no authority, unless it be that it is borrowed from Selden, who is not a contemporary authority, and whose writings are so prejudiced against all things ecclesiastical that he cannot be relied upon, save so far as he cites contemporary authority, of which in this matter he cites none that supports this absurd representation. It is utterly at variance with what the author had already quoted from Glanville—viz., that the law gave the heirs or next of kin a very good and sufficient remedy against any one withholding the effects of the deceased, and also laid down very clearly, quite in accordance with canon law, that the debts must first be satisfied. It is a fundamental principle of canon law, as the author, if he had been in the least acquainted with it, would have known. He, indeed, refers to Lyndwood as his authority on canon law (*vide ante*), but merely gives his own account of it, instead of resorting to the canon law itself; and in the next passage, when he cites the Decretals, he entirely misrepresents their effect.

(b) It appears from the next reference that the author quoted from Selden; but if he had quoted the terms of the Decretal, it would have appeared that this meant *after the satisfaction of just debts*. It was only after that the distribution could commence, as the author must have known from Glanville, whom he had himself cited upon that point (c. 3). He must have forgotten this, to fancy that the canon law could ever have laid down anything so monstrous as that the next of kin and the church could divide all the effects *before* satisfying the debts of the deceased. The canonists were too good lawyers for that, and what they laid down was in exact accordance with the law of the land—viz., that upon the distribution, which could only commence *after* satisfaction of debts, the third part belonged to the deceased—that is, was to be applied to pious uses for the benefit of his soul. This was according to the ideas of the age, and the law was naturally in accordance with them. It may be added that it is the third book of the Decretals which treats of testaments and intestacy, and in which the ecclesiastical law is stated to the effect that the debts must first be satisfied.

(c) The author does not quote this constitution, nor give any reference to it, nor state whether it was an ecclesiastical or a lay constitution, nor when it was enacted, nor what are its terms; and so far as he states it, there is nothing to show that it was aimed at the *church*, nor is there any reason to suppose that it was, seeing that, as already shown from Glanville, the next of kin had already ample remedy against any one withholding the effects, unless, indeed, it was the *crown*; and all the charters after the time of John contained a clause to protect the assets of deceased tenants of the *crown* from the exactions of the king's officers, who seized the effects on the plea of indebtedness to the crown; and this clause therefore provided that, after satisfying the debts to the crown, the residue—or, if there were no debts to the crown—then the *whole* should be distributed among the next of kin—that is, of course, according to the law, leaving a share for the deceased.

<sup>1</sup> Decretal, lib. v. tit. 3, c. 42.

<sup>2</sup> Seld. 1681.

abuses of ecclesiastical judges gave occasion to two statutes, made in the reign of Edward I. and Edward III.

The last mode of acquiring property was *by succession*. The law of descent in the time of Glanville continued, with some small variation. We have seen that in Glanville's time the eldest son was the sole heir, in knight-service, and in most instances in socage;<sup>1</sup> but it was now laid down by Bracton, generally, that, in both cases, *jus descendit ad primogenitum*.<sup>2</sup> It was also now held, that all descendants *in infinitum* from any person who would have been heir, if living, were to inherit *jure representationis*. Thus the eldest son dying in the lifetime of his father, and leaving issue, *that* issue was to be preferred, in inheriting to the grandfather, before any younger brother of the father; which settled the doubt that had occasioned so much debate in the time of Henry II.<sup>3</sup>

The rule of descent was, that the nearest heir should succeed; *propinquior excludit propinquum, propinquus remotum, remotus remotiorem*. Sometimes the right of blood constituted a particular sort of propinquity, to the prejudice of the male heir, who, in other instances, is so much favoured in our law; as in the following case: A man had a son and daughter by one wife, and after her death married another, and had a son and daughter by her; the son of the second marriage made a *purchase* of land, and died without children: in this case, says Bracton, the sister by the second wife would take, in exclusion of the other brother and sister. Some were of opinion, that this piece of law was entirely confined to cases of purchased lands, but that it was otherwise in cases of inheritance; for there respect was always to be had to the common ancestor from whom the inheritance descended; and the right should never come to a woman so long as there was a male, or one descended from a male, whether from the same father and mother, or not.<sup>4</sup> Bracton, however, seems to think, that this rule of descent was to be observed in *inheritances*, as well as in purchased lands; because every one, as he came into seisin, made a *stipes* and a first degree;<sup>5</sup> and so it was settled in the next reign, when this opinion of Bracton was adopted in the maxim, *seisina facit stipitem*. The impediment thrown in the way of descent by the rule, *nemo potest esse hæres et dominus*, still continued, though it was avoided by many devices; the most common of which was that of infeofing to hold of the chief lord, and not of the feoffer; for this avoided the necessity of doing homage to the elder brother.<sup>6</sup>

The law had provided a preventive against imposing supposititious children, to exclude those who were next entitled to the inheritance. If a woman, either in the life of her husband, or after his death, had pretended to be pregnant when it was thought she was not, in order to disinherit the heir; the heir might

<sup>1</sup> *Vide ante*, 78.

<sup>5</sup> *Ibid.* 65 b.

<sup>2</sup> Bract. 64 b.

<sup>6</sup> *Ibid.* 63 a. b.

<sup>3</sup> *Vide ante*, 79.

<sup>4</sup> Bract. 65.

have a writ commanding the sheriff to cause the woman to come before him, and before the guardians of the pleas of the crown, or before such person as the king should authorise to judge therein, and cause her to be inspected by lawful and discreet women, in order to inquire of the truth;<sup>1</sup> and she was put in a sort of free custody during her pregnancy, that the imposture, if any, might not escape detection. This was the way in which a woman was dealt with, when she falsely pretended to be pregnant. If the husband and wife agreed together in educating a supposititious child as their own, the right heir might have a writ *quod habeas corpora* of the husband and wife before the justices, where the truth would be examined. Another person who had a temptation to play this trick upon the next heir, was the chief lord, who, when he had an heir in ward, and it died, would sometimes set up another, in order to continue the custody of the land; in which case, there was a writ and proceeding similar to the former.<sup>2</sup>

When an inheritance descended to more than one heir, and they could come to no agreement among themselves concerning the division of it, a proceeding might be instituted to compel a *partition*. Of partition. A writ was for this purpose directed to four or five persons, who were appointed justices for the occasion, and were to *extend* and appreciate the land by the oaths of good and lawful persons chosen by the parties, who were called *extensores*; and this extent was to be returned under their seals, before the king or his justices: when partition was made in the king's court, in pursuance of such extent, there issued a *seisinam habere facias*, for each of the *parceners* to have possession.<sup>3</sup>

It remains only to say a few words on the claim of dower, and then we shall have finished this part of our subject, namely, the title of private rights. Dower is defined by Bracton not in the words, but upon the ideas of Glanville.<sup>4</sup> Dower, says he, must be *the third part of all the lands and tenements which a man had in his demesne, and in fee, of which he could endow his wife on the day of the espousals*;<sup>5</sup> so that, according to Bracton, the claim of dower was still limited to the freehold of which the husband was seised at the time of the espousals, notwithstanding the provision of *Magna Charta*, which seemed to extend it to all the land that belonged to the husband during the coverture.<sup>6</sup> The regular assignment of dower had been secured to widows by the chapter of *Magna Charta* just alluded to, and it was rendered more effectual by a provision in the statute of Merton.<sup>7</sup> More will be said of dower when we come to the remedies which the law had furnished for recovery of it.

Thus far concerning the law of private rights, as it stood in the time of Henry III.

<sup>1</sup> Bract. 69, 70 a. b.

<sup>4</sup> *Vide ante*, 72.

<sup>7</sup> *Ibid.* 261.

<sup>2</sup> *Ibid.* 70 b, 71.

<sup>5</sup> Bract. 92.

<sup>3</sup> *Ibid.* 71 b. to 77 b.

<sup>6</sup> *Vide ante*, 242.



## CHAPTER VI.

### HENRY III.

*Of Actions—Of Courts—Writs—Of Disseisin—Assize of Novel Disseisin—Form of the Writ—Proceeding thereon—Of the Verdict—Exceptions to the Assize—Assisa veritur in Juratum—Quare ejecit infra Terminum—Assize of Common—Of Nuisance—Assisa Ultimæ Presentationis—Exceptions thereto—Of Quare Impedit—Quare non Permittat—Assisa Mortis Antecessoris—Vouching of Warrantor—Where this Writ. would lie—Writ de Consanguinitate—Quodd Permittat—Assisa Utrum—Of Convictions—and Certificates—Of different Trials—Dower unde Nihil—Writ of Right of Dower—Of Waste—Of Writs of Entry—Different Kinds thereof.*

THE whole course of judicial proceeding, since the time of Glanville, had become a business of much learning and refinement; the writ, the process, the pleading, the trial, every part of an action was treated as a subject of intricate discussion. While these changes were made in the old remedies, new ones were invented, as more peculiarly adapted to certain cases than those before in use. Of all these we shall treat in their order.

Actions are divided by Bracton into such as were *in rem*, or *in personam*, or *mixt*; that is *real*, *personal*, or *mixt*.<sup>1</sup>

*Of actions.* Personal actions were for redress in matters *ex contractu*, and *ex maleficio*, as the civilians termed it; and also in such as they called *quasi ex contractu*, and *quasi ex maleficio*. It follows, that of personal actions arising *ex maleficio*, some were *civil*, and some *criminal*. Real actions are for the recovery of some certain thing; as a farm, or land: they were always brought against the person then in possession of the thing, and were for the recovery of it *in specie*, and not for an equivalent in damages.<sup>2</sup> When an action was brought for any movable, some thought that it should be considered as a real action, as well as personal, because the person possessed of it was to make restitution of the thing in question; but says Bracton, this was, in truth, only personal; for the defendant was not obliged specifically to restore the thing demanded, but was only bound to the alternative of restoring the thing, or its price; and therefore, in such an action, the price of the thing ought always to be defined. A mixt action was so called, because it was *tam in personam, quàm in rem*, having a mixt cause on which it was founded; as the proceeding *de partitione* among parceners, and *de proparte sororum*; that for settling of bounds between neighbours and baronies *per rationabiles divisus*, or *per perambu-*

<sup>1</sup> Bract. 101 b.

<sup>2</sup> *Ibid.* 102.

*lationes*; in which each party seems to have been plaintiff and defendant, though he alone was properly plaintiff who commenced the suit.

Real actions were divided into such as were to recover *possession*, and such as were to recover the *property* (*a*); a distinction which will be very strictly observed in all we have to say on these actions, and was rigidly adhered to in applying them; it being a rule, that though a person who had failed in any proceeding for the possession, might resort to the next superior remedy, yet he could never descend. He might have an assise of novel disseisin; and if he failed in that, he might have a writ of entry (a new writ, of which we shall soon say more), and lastly a writ of right: but having begun with a writ of right, he could not avail himself of the other remedies.<sup>1</sup>

Some actions were permitted by law to be brought at any distance of time; but, in general, actions were *limited* to be brought within a certain period, on account of the defect of proof which would happen in a course of years.<sup>2</sup> Suits which were to recover such things as belonged to the king's crown, might be brought at any distance of time; on which privilege of the king was founded this rule, that *nullum tempus currit contra regem*, or *nullum tempus occurrit regi*; and it should seem from Bracton's manner of expressing himself, that, inasmuch as the suits of private parties were limited, because, beyond a certain period, they could hardly be able to bring proofs; the king, in concurrence with the privilege of instituting his suits without any limitation of time, should, in questions of antiquity, be entitled to throw the *onus probandi* on the defendant (*b*); and on his failing, should recover without bringing any proof at all.<sup>3</sup>

Before we enter upon the proceeding and conduct of actions then

(*a*) The distinction drawn in the *Mirror* between these two kinds of jurisdiction is in the object, *i.e.*, whether it be punishment or compensation (c. iii. s. 17). If punishable corporally, as by compulsion, by imprisonment (as opposed to its substitution for fine), or by bodily infliction, then the matter was regarded as criminal; but otherwise, if it was in its nature the subject of reasonable satisfaction (c. ii., s. 24). And again, If any one seek revenge, he ought to bring his action by appeal for felony; if he seeketh only reparation in damages, then it behoveth him to bring his action by writ (c. ii. s. 3).

(*b*) In the *Mirror*, however, which often follows Bracton very closely, the same doctrine is laid down, "As to the alienations and occupations of franchises, appendants to the crown, a man shall not prescribe for them, for of such dignities none can help himself by a plea of long prescription; but such avowries of long continuance are accounted rather prescriptions of wrong, seeing that *nullum tempus occurrit regi*; but therein the king is like an infant, who can lose nothing, although for the personal wrong the party may excuse it by showing that he enjoyed the privilege by succession or assignment; but this is counter-pleadable by alleging that the ancestor could not grant it," &c. (c. iii. s. 26). It is to be observed that there is mention in the *Mirror* of limitation of criminal suits since the last "eyre," a circuit of assize of "oyer and terminer," which used at one time to be once in seven years, though the period varied. There was also the limitation of an assize of novel disseisin. In the *Mirror* it is said to be an abuse to allow an action after the last eyre.

<sup>1</sup> Bract. 104.

<sup>2</sup> *Ibid.* 102 b.

<sup>3</sup> *Ibid.* 103.

in use, it may be convenient to premise a short view of the courts in which civil and criminal justice was administered:

Of courts. and first of criminal suits (a). Criminal suits, where a corporal pain was to be inflicted, used to be determined *in curia domini regis*, in the king's court; which general expression is explained in Bracton by saying; that if the offence concerned the king's person, as the crime of lese majesty, it was determined *coram ipso rege*, by which was meant the great superior court, of which so much has been already said: if it concerned a private person, it was *coram justitiariis ad hoc specialiter assignatis*; that is, we may suppose, either the justices in eyre or of jail-delivery (b). These were all equally the king's courts; and as the lives and limbs of his subjects were in the king's hands, either for protection or punishment, it was proper they should be subject to his decision only, unless in the few instances where persons enjoyed the franchise of holding a criminal court; as the franchises of *Toll* and *Tem*, of *Infangthef* and *Outfangthef*.<sup>1</sup>

The courts for the determination of civil suits were as follow:—Real actions might be commenced in the lord's court of whom the demandant claimed to hold his land, from whence they might be transferred, upon failure of justice, to the sheriff's court, and from thence to the superior one;<sup>2</sup> but if such a suit was not removed for some cause or other, it might be determined in the court baron. In the county court were held pleas upon writs of *justicies*, as *de servitiis et consuetudinibus*, of debt, and an infinitude of other

(a) The corporal punishments in those times were cruel, and in some cases horrible, though there was a gradual process of amelioration already beginning. The law of William the Conqueror allowing mutilation has been already alluded to. But even in the *Mirror* it is mentioned that cut-purses used to be punished by the cutting off of their hands (c. ii. s. 13); and although it seems Richard I. rather mitigated this, it was only mitigated to cutting off the ear (*Ibid.* s. 21). Perjury was punished by cutting out the tongue (*Ibid.* s. 13). Some offenders were flogged or beaten. As to capital sentences, some offenders were hanged, others boiled or burnt; others, as in treason, hanged and cut down alive, and then disembowelled and cut to pieces. And it seemed scarcely credible that some of these horrors continued almost to our own time, and that even in our own time men were hanged for forging five-pound notes or stealing sheep. So *ingrained* in barbarism was our criminal code, owing to the savage spirit of the Saxon, the Norman, and the Dane.

(b) This does not appear altogether a correct rendering of the text of Bracton, which our author is merely following. What Bracton seems to mean is that actions are necessarily, in fact, and in a certain sense, limited, because in course of time the proofs fail, "*Sunt quedam quæ aliquando fiant perpetuæ, et durare solent sine tempore præfinitione, hodie vero fere omnes supra certa tempora limitantur, pro defectu probationum, et sic sunt temporales, secundum quarundam actionem diversitates.*" And then he points out that this cannot apply to the pleas as to liberties and franchises of the crown, nor affect the maxim *nullum tempus occurrit regi*, because as to these the onus of proof is on the defendant, "*Cum probare non habeat necesse, et sine probatione obtinebit, si implacitatus warrentum non habuerit, nec specialem libertatem, quia se ex longo tempore, non defendet*" (*Bracton*, lib. iii. f. 103). Bracton, however, as to the rights of the crown, can hardly be relied upon; and when in the reign of Edward I. it was attempted to apply this doctrine, and to oust men of their franchises, by *quo warranto*, on the principle thus stated, such an outcry arose that the king had to desist.

<sup>1</sup> Bract. 104 b.

<sup>2</sup> *Ad magnam curiam.* Bract. 105.

causes, among which were, suits *de recto natio*, and pleas *de naticis*, unless it became an issue, whether free or not, and then the inquiry stood over till the coming of the king's justices; the question of a man's liberty being thought of too high consideration to be intrusted to an inferior jurisdiction.

Such civil actions, whether personal or real, which were determinable in the king's court, were heard before justices of different kinds. The different courts which were called the king's are thus described by Bracton: *Curiarum habet unam propriam, sicut aulam regiam, et justitiales capitales, qui proprias causas regis terminant, et aliorum omnium, per querelam, et per privilegium sive libertatem*; the latter part of which description he explains by instancing one who had a grant not to be impleaded anywhere but *coram ipso domino rege*; though it might be doubted whether *per querelam* is thereby explained, and whether that expression does not mean a distinct method of proceeding by *complaint*, similar to what we see at this day in the modern King's Bench, and of which we shall have occasion to say more hereafter. Thus far of the *aula regis*. Our author proceeds, and says, *habet etiam curiam, et justitiales in banco residentes, qui cognoscunt de omnibus placitis, de quibus auctoritatem habent cognoscendi; et sine warranto jurisdictionem non habent, nec coercitionem*; in which he seems to describe the *bench* as having no authority but by the writs returnable there. He goes on to mention the justices itinerant through the counties; sometimes *ad omnia placita*; sometimes *ad quendam specialia*; as to take assizes of novel disseisin, of mortmaince, and *ad gradas deliberandas*, to deliver one or more particular juries (*a*). As causes were sometimes removed from the court baron to the county, so, as appears from Bracton, and as was hinted above, were they removed before the justices itinerant, and from thence into the bench, or *coram rege*.<sup>1</sup> These are all the courts spoken of by Bracton; and therefore it must be concluded that the Court of Exchequer was still considered as identically the same with the *aula regis*; and that the *proprias causas regis* particularly meant the government of the revenue, which is perfectly consistent with the account before

(a) In the *Mirror* it is said, "The king appoints justices in divers manners, sometimes certain, as in commission of less assizes; sometimes in commissions generally, as of commissions of justices in eyre, and of the chief justices of pleas before the king, and of justices of the bench, to whom jurisdiction is given to hear and determine fines, the grand assizes, the transaction of pleas and the rights of the king" (c. iii. s. 3). These courts are the King's Bench and the Common Pleas. "Besides these, the barons of the Exchequer have jurisdiction over receivers and the king's bailiffs, and alienations of lands and rights belonging to the crown. Sometimes the jurisdiction is given to the justices of the bench by removing the pleas out of the counties before them, and sometimes to record pleas holden in mean courts without writs before the justices. To the office of chief justices, i.e., the judges of the chief court, the King's Bench, it belongeth to redress the tortious judgments, and the errors or wrongs of other justices, and by writs to cause to come before them the proceedings and records. Also to hear and determine all plaints of personal wrongs within twelve miles of the king's household."

<sup>1</sup> Bract. 105 b.

given<sup>1</sup> of this great court in its first origin, and before the bench had any existence.

Besides this express account of courts, there are scattered up and down Bracton's work several passages which give us intimation of the nature of these courts, the principal of which are the returns of writs. A comparison of such expressions, as they occur in the course of this chapter, will throw a new light on the judicature of the time.

The subject of writs seems to have been studied with great diligence; writs had been devised for a greater variety of occasions than in Glanville's time, and they were discussed with more precision and system. Bracton divides writs into different kinds, in this way. He says there were some which were *formata super certis casibus*, DE CURSU, et de communi consilio lotius regni concessa et approbata; and these could not be changed without the consent of the same power that framed them. There were others which he calls *magistralia*, and which were varied according to the variety of cases and complaints. These *magistralia brevia*, it should seem from Bracton's account of them, were distinguished from, and put in contrast with, the *brevia formata*, as being changeable without the permission of the legislature.<sup>2</sup> Those which gave origin and commencement to a suit<sup>3</sup> were called *brevia originalia*, and were called, some of them *aperta*, or *patentia*, and some *clausa*; such as arose out of these were called *judicialia*: these were varied according to the pleadings between the parties, and the particular purpose which they were to answer.

In discoursing on the nature of civil actions, we shall begin with those that were called *real*. In order to understand the design of the various real remedies which the law furnished, it will be necessary to attend to the manner in which they considered the occupation of land and its appurtenances, under the circumstances of a more or less complete enjoyment.

Of land, a man might have either what they called *possession*, or what they called *jus*, or *proprietas*. Possession was of various sorts, and divided by very nice distinctions. One was said to be *quædam nuda pedum positio*, which they called *intrusion*: and this contained in it, says Bracton, *minimum possessionis*, and *nihil juris*, being somewhat of the nature of a desseisin: in both it was a *nuda possessio* till it received a *vestimentum* by length of time. Another was a precarious and clandestine possession, attended with violence, which acquired no *vestimentum* by length of time; and this, says the same authority, had *parum possessionis* and *nihil juris*. A possession for term of years, as it gave nothing but the usufruct, was considered in a degree higher, as having *aliquid possessionis*, but *nihil juris* (a). The next was for life, as dower, or

(a) This, it is conceived, by itself might lead to mistake, as it hardly conveys the meaning of Bracton, as the context will clearly show. The words of Bracton are,

<sup>1</sup> Vide ante, 48, 49, &c.

<sup>2</sup> Bract. 413 b.

<sup>3</sup> Ibid. 414 b.

the like; and this being a step higher, was said to be *multum possessionis*, but still *nihil juris*. The next degree was, where a person had the freehold and fee to him and his heirs; and then he was said to have *plus possessionis, et multum juris*: and he who had the freehold, fee, and property, united in himself, had *plurimum possessionis* and *plurimum juris*, which was called *droit droit*, and contained the highest degree of property and possession; except that, even then, some other person might have *jus majus*, or greater right.<sup>1</sup>

We shall speak of the remedies applicable to these several kinds of possession in the order suggested by the above distinctions, beginning with the writ of *intrusion*. Intrusion was, when a person, not having the least spark of right, came into a vacant possession; as, after the death of an ancestor, before the heir or the lord entered. The person entitled to the reversion, in such case, might have a writ, which had been invented since the time of Glanville, and resulted from some of the artificial notions which we have just stated concerning possession. The form of this writ varied according to the circumstances under which the person bringing it claimed; whether he was the lord or the heir; whether he claimed upon the death of an ancestor, of a tenant in dower, or *per legem Angliæ*, or for life. The following was a more general form of it:—*Rec vicecomiti salutem. Pone per radium et saluos plegios A. quòd sit coram, &c., ad respondendum, or, ostensurus quare intrusit se in terram, &c., quam B. qui nuper obiit, tenuit de eodem C. ad vitam suam tantum, et quæ, post mortem ejusdem B. ad eundem C. reverti debuit, ut idem C. dicit: et habeas, &c.*

Possession created a sort of right; it was advisable, therefore,

“Est et alia, quæ aliquid possessionis habet, et nihil juris, sicut illa quæ conceditur ad terminum annorum, ubi nihil exigi poterit nisi usufructus.” This, of course, is all that a lessee can take, the fruits and profits; and it is all that an owner in fee can take, the difference being in the *jus proprietatis*, the absolute right of property; and this even a tenant for life had not, for the next sentence is, “Est etiam quedam quæ multum habet possessionis et nihil juris; sicut illa quam quis habet ad vitam tantum.” So that tenant for years only could be said to have nothing of right, in the same sense in which it might be said of a freeholder, unless he had estate of inheritance. Yet the latter could have assize to recover his land; and so the *Mirror* says of a tenant for years. And it is conceived that the contrary notion, if it ever prevailed in those days, and was not a supposition of later times, was an entire error. In the *Mirror*, under the title of “*Novel Disseisin*,” it is said, “The right of property is not determinable by this assize, as is the known possession, or of that which altogether savoureth of a possessory right;” and it is added, “Ejection of a term of years falleth into this assize, which sometimes cometh by lease” (c. ii. s. 25). And elsewhere it is said, “It is abuse to think that one cannot recover a term for years” (c. v. s. 1). There were long terms in those times. Thus it is said, “It is abuse that leases of farms are not longer than forty years” (*Ibid.*); and it is too absurd to imagine that interests of this duration and nature were without protection. The whole of our legal tradition as to the remedies for recovery of terms of years and the interests of lessees is false and erroneous, and has arisen from theorising, in place of an attentive study of the contemporary records of legal history. At some period, the action of ejectment was instituted, and assizes were confined to freeholds; and then a farther error was fallen into of supposing that the term was not recoverable.

<sup>1</sup> Bract. 159 b., 160.

for the heir to eject the intruder within a year, or at the end of that time, have recourse to this writ; for it is laid down by Bracton, that no one could be put to answer for an intrusion of longer standing. Respecting this time of limitation, Bracton seems not very precise, for he afterwards says, at farthest, not at the distance of ten or twelve years, as was determined in this reign;<sup>1</sup> but the claimant was then driven to his writ of entry, grounded upon the intrusion;<sup>2</sup> a writ lately invented, of which more will be said in its proper place.

The next thing to be considered is, that wrongful possession which was obtained by disseisin, and the method of redress the law directed to be pursued (*a*). Disseisin was now considered in a very large sense, and much beyond the idea to which it was first applied. It was not only when the owner, or his agent, or family, who were in seisin in his name, were ejected from the freehold unjustly and violently, without judgment of law; but also, when a house had been left without any one therein, and the owner, his agent, or family, returning from his business, was denied admittance by one who had taken possession, it was a disseisin; if a man was obstructed in a free use of his freehold, that was a disseisin; for though he might remain in possession, the full extent of that possession was not enjoyed. If any one dug, or put sheep, or otherwise intruded, upon land, under claim of an easement (for if it was without a claim of right, it was only a trespass); or, if a person made improper use of an easement he had a right to: this was a disseisin (*b*). Again, if a person was in seisin for life, or for years, or as guardian, or otherwise, and infeoffed another, in prejudice of the right owner; if a person distrained for

(*a*) The author is here still following Bracton, and it is remarkable how entirely the *Mirror* followed him upon this, as upon so many other subjects. "Disseisin is a personal trespass, or a wrongful putting one out of possession; wrong is here taken for deforcement or disturbance, as for ejection. Deforcement, as if another entereth into another's tenement when the rightful owner is at the market or elsewhere, and at his return cannot enter therein, but is kept out, and hindered so to do. Disturbance is if one disturb me wrongfully to use my seisin, which I have peaceably had; and the same may be done in various ways, as when one driveth away a distress, so that I cannot distrain in the tenement liable to my distress, whereof I have had seisin before. 2. Another is where one doth replevy his distress wrongfully. 3. As if one distrain me so outrageously that I cannot manure, plough, or sow my land duly" (*Mirror*, c. iii. s. 2).

(*b*) A distinction which, as has been pointed out, was derived from the civil and canon laws (*vide ante*, p. xv.), and is to be found in the *Mirror of Justice*. "Note that all property is in two kinds—either in right of possession or in right of property, and therefore there were distinct remedies for either, and the remedy by assize of novel disseisin was for the *known possession*—that is to say, if a man were forcibly turned out of possession, even although he had no right to it, he could have restitution by this assize, and the disseisee was put to his writ of right, which was the remedy for recovery of the right of property." "If I take from you forcibly anything of which you have *peaceable possession*, I do wrong to the king; when I use force when I ought to use *judgment*—i.e. resort to a court of law for redress (c. ii. s. 25). It is very remarkable that it is distinctly stated in the *Mirror* that the remedy lay for a term or lease for years.

<sup>1</sup> 16 Hen. III.

<sup>2</sup> Bract. 160, 161 a.

services not due, or where they were due, exceeded the bounds of a reasonable distress, these were disseisins. In short, if one claimed to partake with the right owner, or raised an unjust contention against him, it was a disseisin of the freehold.<sup>1</sup>

The above were disseisins without violence; others were said to be violent; but, in order to understand what the law considered as a violent disseisin, we must see what the nature of *vis* was. *Vis* was of two kinds, according to Bracton: thus, there was *vis simplex* and *vis armata*. It is not difficult to conceive what was said to be *vis armata*: it was not only the coming with weapons of any sort, or finding them at the place where they were used; but if a person came with arms, and made no use of them, the terror of them might be thought so to have operated as to make the disseisin seem to have been *cum armis*. *Vis simplex* is defined by Bracton to be *quotiens quis, quod sibi videri putat, non per judicem reposit*; that is, wherever a person took the law into his own hands. This distinction of *vis cum armis* and *vis sine armis*, was important, as the penalty upon disseisors was proportioned thereto.<sup>2</sup>

Whatever was the way in which the disseisin was committed, the law not only allowed, but required the disseisee, *incontinenter*, *flagrante disseisinâ et maleficio*, to expel the wrong-doer. What was meant by *incontinenter*, Bracton thinks was pointed out by the term of fifteen days allowed to a tenant summoned in a writ of right. If the owner was present at the time of the disseisin, he was to eject the disseisor that very day, if possible, or on the morrow, or the third or fourth day; and beyond that time, provided he had uninterruptedly continued his endeavours, by calling in the assistance of his friends, and resuming the attack.

If he was absent when the disseisin was committed, then a distinction was to be made according to the distance; a reasonable time was allowed for his getting information of the fact, and for his arrival; and if he pursued his attack upon the disseisor within the stated time after such arrival, the law considered it as done *incontinenter*. As, for instance, if he was out of the kingdom in what was called *simplex peregrinatio* to St Jago, or in the king's service in Gascony, he had forty days, and two floods and one ebb, which latter indulgence was for the delay occasioned by the sea; and then he had the fifteen days after he returned, and also the four days above mentioned, to resume the attack. If he was in a *simplex peregrinatio* to the Holy Land, he had a year allowed him, together with the fifteen and four days; but if he was in what they called a *general passage* to the Holy Land, the time was three years, together with the fifteen and four days.

Such was the time allowed by the law for a man to redress the injury he had suffered, but if he permitted a longer period than that to elapse, he gave up this right, and lost both his natural and civil possession, as they called it, which were thenceforward in the

<sup>1</sup> Bract. 161 b. 162.

<sup>2</sup> *Ibid.* 162.



disseisee, who could not afterwards be ejected but by judgment of law.<sup>1</sup>

As to the power of redress by the act of the party injured, and the situation in which recourse must be had to the assize, the law may be shortly stated in this manner. For instance, I eject you from your freehold, you may have an assize. Again, I eject you, and you me, incontinently, *flagrante disseisinâ*; I cannot have an assize, because I only suffer what I had before done myself. Again, I eject you, and you eject me, incontinently, and I, again, incontinently eject you; still you may have an assize, and so *in infinitum*; for the true possessor may, by law, eject, incontinently, the wrong-doer, and an assize shall not be brought against him for it; but should the true possessor be negligent, after the disseisin, in pursuing the injury, he lost, as was before said, both his civil and natural possession, and had no redress but by the assize<sup>2</sup> (a).

If the disseisor transferred the land on the day of the disseisin, or the day after, the donee might be ejected, incontinently, by the true owner, the same as the principal disseisor; in like manner also, the assize might be brought against both; against the first *ad pœnam*, and against the second *ad pœnam* and *ad restitutionem*. If a long interval had passed between the disseisin and the transfer, the second would not have been liable *ad pœnam*, but only to make restitution.<sup>3</sup> Again, if the first wrong-doer was disseised by another, the true owner might either incontinently eject the last disseisor, or bring an assize against him; and if he deferred doing it, the first disseisor might do either. In all these cases of recovering

(a) Here, again, it is observable how closely the *Mirror* follows Bracton: "It is said wrongful to put a difference from rightful, which is no offence—as, if you take from me that which is mine, I may take it from you again; and I do not offend, for I am warranted to do so by the law of nature. But I cannot do so afterwards; for if I take from you *forcibly* anything whereof you have had the peaceable possession, I do disseise you, and I do wrong to the king when I disseise him of his right, or use force when I ought to use judgment—i.e., resort to law (c. xxiii. s. 27). It is remarkable that, so lately as the reign of Henry VI., lands and houses were forcibly taken possession of and held by force of arms, inasmuch that men were actually killed in the defence, as will be seen from the *Paston Letters* (v. 2, l. 281). In that reign, the statute of forcible entry passed, to prohibit such *forcible* seizure of property, and Lord Coke says that it only affirmed the common law. Elsewhere it is said, on disseisin: The jury are not to be examined upon the *title* of the possession, but it is sufficient for the judge to know if the plaintiff were disseised of his land, whether it were rightful or wrongful, according to the plaint. For, though it were right, nevertheless it was tortious, because the tenant used force where he should have used judgment, and made himself a judge therein; and judgment is to be given for the plaintiff, so as he shall recover seisin in another court." It is also said: It behoveth to inquire if the disseisors came with force and arms, although they hurt no one's body, all of them, nevertheless, are to be adjudged to corporal punishment; and if they cast him out of his dwelling-house, or out of his demesne, the felony is punishable at the king's suit or at the suit of the party, for no one is to be cast out of his house, where he dwelleth, and which he hath used as his own for a year, without judgment, though he hath no title thereto but by disseisin or intrusion; and it sufficeth for force and arms, or by the showing of arms, for to hurt the adversaries; and under the name of arms are contained bows, arrows, saws, lances, spears, staves, swords, and targets of iron (c. iii. s. 29).

<sup>1</sup> Bract, 163.<sup>2</sup> *Ibid.* 164.<sup>3</sup> *Ibid.*

possession by force, the sheriff, though not bound to interfere *ex officio*, might assist at the request of the disseisee; yet he was to take care how he acted, as he would be subject to an assize, in like manner as the person whom he meant to assist; he might take a part in these matters, either as a private friend or officially as sheriff, to keep the king's peace.<sup>1</sup>

When the party disseised had neglected to avail himself of the authority the law gave him to recover possession while the injury was fresh (*a*), he was then to recur to the *Assize of novel disseisin*. recognition of assize; that compendious way for recovering possession, which became now more practised than ever.

Everybody who was a tenant of a freehold *nomine suo proprio*, might have this remedy by assize; those therefore who were in possession, *nomine alieno*, as a guardian, an agent, the family of a man, or his servant, a *firmarius* or fructuary (not being a *fiedli firmarius*), an usurer or guest, one who held from day to day or from year to year, or an usufructuary who held for a term of years, none of these could bring an assize, but that remedy was left to him who was the *dominus proprietatis*, out of whose fee all those interests issued. It is laid down gravely by Bracton, that should a man be ejected from his ship, *quasi de libero tenemento*, he was no more entitled to an assize than if he had been dragged from his horse or carriage, though he makes a question concerning an ejection from a wooden house; to which he answers, that if it stood on his own land, whether adhering to the soil or not, an assize would lie; but if on the land of another, and there had been any prohibition or injunction against the building or removal, the person on whose land it was built might have an assize; if there had been none, and it had been removed without any contest, he could not have an assize.<sup>2</sup>

An assize lay not only against the disseisor, but against all his aiders and abettors, whether present or not; not only against those who did the fact, but against those in whose name it was done, or who, after it was done, concurred in or approved it; as by this avowal and ratification they seem to make themselves parties.<sup>3</sup> It only lay against those who were in some of the above ways parties to the fact and therefore not against an heir, or successor to the disseisor, who, though liable to make restitution, were not to undergo a penalty for the disseisin.<sup>4</sup> Nevertheless, where any of the parties died, or the assize had not been brought with such diligence as the

(*a*) Here, again, the author follows Bracton, as the *Mirror* had followed him: "It is called 'novel' to put a difference from those which are ancient, for anciently kings used to go over the shires to hear, inquire, and determine offences, and to redress the wrongs there, and that afterwards, by reason of the multitude of offences; and, that kings could not do all by themselves, they sent their justices in eyre, who have not power to decide and determine a personal offence, but for a thing brought and not determined in the last eyre. And if the disseisin was before the eyre, then it was ancient; but if it were done since the last eyre, then it was a 'novel' disseisin (c. iii. s. 25).

<sup>1</sup> Bract. 164.<sup>2</sup> *Ibid.* 167, 168.<sup>3</sup> *Ibid.* 171.<sup>4</sup> *Ibid.* 172.

law required, and the matter was not, by commencement of some proceeding, become *litigious*, as the lawyers called it; in such cases recourse was to be had, not to a writ of right as formerly, but to a remedy which had been lately invented, called a writ *de ingressu*, or writ of entry, which has been so often alluded to, and of which more will be said hereafter.<sup>1</sup>

The form of the writ of novel disseisin differed from that in Glanville's time in nothing but in the return; the limitation was still, notwithstanding the statute, *post ultimum redditum domini regis de Britanniâ in Angliam*; <sup>Form of the writ.</sup> <sup>2</sup> but the return was *usq; ad primam assisam cum justitiiarii nostri ad partes illas venerint*; according to the appointment of justices of assize as directed to be made by *Magna Charta*. It seems, that upon this writ pledges of prosecution were to be taken by the sheriff only in case they had not been found in the king's court or a promise given, which used in some instances to be accepted instead of pledges. The pledges were to be two at least, and such as were sufficient to pay the *misericordia* to the king, if the complainant should retract or not prosecute his suit. If a husband and wife were complainants, two pledges were enough; and it was the practice to be contented with two, when there were more complainants than one, though it was thought safer that each should find two. Notwithstanding the clause commanding the sheriff *quod faciat tenementum reseisiri de catallis* was still continued, this part of the writ, says Bracton, was never executed, but these were left to be estimated in the damages by the recognitors.<sup>3</sup>

The other directions of the writ were to be executed as follow:—In pursuance of *quod tenementum faciat esse in pace*, &c., the sheriff was to see that the disseisor did not convey the land to any one, and that the disseisee made no entry thereon; and if an entry was made by any one, under any pretext whatever, he was to restore it to the true owner, so to remain till the next assize. As to sending the recognitors *ad videndum tenementum*, he was to cause a view to be had, not by one or two, but by the whole if possible, or at least by seven; for an assize could not, says Bracton, be taken by less than seven, though it might for particular reasons be taken by more than twelve.

The reason of a view was, that there might be a certainty about the matter in question, both for the guide of the jurors in swearing and the judge in giving judgment. The jurors were to see what the freehold was, whether it was land or rent, whether it was consecrated to the church or not, whether it was held solely or in common. They were to see that the complainant did not put more in view than he had claimed in his writ, for then he would be amerced, though he might, if he pleased, put less. They were to see in what vill, in what *locus*, in what part of the *locus*, and within what bounds, the freehold lay. If it was a rent, they were to see the land out of

<sup>1</sup> Bract. 175, 176.<sup>2</sup> Vide ante, 264.<sup>3</sup> Bract. 179.

which it issued (an assize being the remedy for rents in some cases where a distress failed), the like of common pasture. They were to view not only the land where the common lay, but also that to which it was appurtenant;<sup>1</sup> and thus, in all cases, the jurors were to have a view of the thing in question for their better information.<sup>2</sup>

It was the complainant's duty to attend and point out all the above circumstances to the jurors; and if he could not, and appeared totally ignorant of the matter, the writ of assize was lost, and the assize *caudit in perambulationem*, as they called it; that is, became, by consent of the parties, a perambulation to make a general inquiry concerning the locality, the metes and bounds of the land.<sup>3</sup> It was a rule, that could the complainant point out the *locus*, but not the precise part thereof, it was sufficient if he was proved by the oaths of the recognitors to have seisin anywhere in the *locus* alleged.

If either of the parties failed to appear at the day appointed before the justices, his pledges were *in misericordia*; Proceeding if neither of them appeared, the assize was void, and <sup>thereon</sup> all, both principals and pledges, were *in misericordia*. If the disseisor appeared and confessed the disseisin, as in so doing he acknowledged an injury which was against the peace, he was to be committed to gaol. If the disseisor was absent, and the complainant present, together with the recognitors, though no one was present for the disseisor, the assize was still to proceed *per defaultum*; it being a rule, that the assize should on no account be delayed; in such case, however, the complainant was always examined as to the ground of his demand.<sup>4</sup> The complainant might, at the time of appearance, make a *retraxit* of his complaint; for which his pledges, as was before said, would be amerced, unless he obtained the license of the court for so doing.<sup>5</sup>

When both parties appeared in court, the writ was to be read, and the matter of complaint inquired into. Bracton blames some judges who, immediately after hearing the writ read, would proceed to ask the party complained of, what he could say against the assize; he thought it hasty and premature to put a person to answer before the matter of the complaint was properly examined and established; for it was not yet known whether the proceeding was to be by an *assize* or by a *jury* (the distinction between which will be seen presently), whether the fact was a *trespass* or a *disseisin*; he thought, therefore, that, as in a question concerning the *proprietas*, the demandant was to show by what right he claimed: in like manner, in this suit, it was not sufficient barely to propound a complaint, but to show the *jus querelæ*, and how the complainant was entitled to make it.

The justices, therefore, for their own information, and to instruct the jurors, were to interrogate as to the particulars of the complainant's case; of what freehold he was disseised, whether land or rent, whether for life or in fee, whether by descent or purchase; of

<sup>1</sup> Bract. 180.<sup>2</sup> *Ibid.*<sup>3</sup> *Ibid.*<sup>4</sup> *Ibid.* 182, 183.<sup>5</sup> *Ibid.* 182 b.

a rent, whether it issued out of a chamber or a freehold, whether for life or in fee; of the boundaries and size of the freehold, whether there was any ejectment from the freehold, whether it was by day or night, with arms or without, with robbery or without; and innumerable other circumstances which might constitute the merits of the case.<sup>1</sup>

When these inquiries had been made, then, and not till then, was the tenant to be asked if he could say anything why the assize ought to remain. The matter of such objection might be found in the interrogatories put to the complainant. If the tenant could show no cause why the assize should remain, but at once denied he had committed any disseisin, he simply put himself upon the assize, and the assize proceeded, as they called it, *in modum assize*, that is, upon the simple question of disseisin; and if the jurors were present, or seven of them at least, against whom there was no cause of exception, they proceeded to take the assize; if they were not present, the assize was deferred to another day, when they were to appear, and the assize was to proceed.

If the jurors appeared at the next day, then the exceptions to them were to be stated. These were of various kinds. Bracton says, that was a good exception to a juror which would be a good one to a witness. One rendered infamous by having been convicted of perjury could not be a juror, according to the rule expressed in the English of those days, "*He ne es othes worthe that es enes gylty of oth broken.*" Any enmity against a party, any friendship with him, was a good exception (*a*). Being a servant, familiarity, consanguinity, affinity, unless the connexion was equally with both parties; being of the same table or family; under the power of a party, so as to be benefited or hurt; owing suit or service; being counsel or advocate; all these, and many others, were good causes of exception

to jurors. When the parties had at length agreed upon the verdict. a juror, they could not afterwards reject him; and when the number was complete, the assize proceeded, the first juror having taken the following oath:—"Hear this, ye justices, that I will speak the truth of this assize, and of the tenement of which I have had a view by the king's writ" (altering these words where the subject was a rent, a common, and the like), "and in nothing will omit to

(a) A juror could be challenged because he held land of the other party (*Year-Book, 7 Edward IV. 5*; *3 Henry VI. 39*); so of a "gossip" or godfather (*Ibid.*, *10 Henry VI. 24*; *49 Assize*); so for any direct relationship to one of the parties (*1 Edward IV. 63*); so if he was favourable to the other party (*10 Henry VI. 10*; *7 Henry VI. 25*; *20 Henry VI. 40*). In order to avoid the evils thus avoided in the king's court by challenges, causes were removed into that court from the local court, the court baron, or the court of the hundred; for it might be that all the tenants of a manor or a hundred were tenants of the other party (*22 Edward IV. 3*); and then, in the king's court, the jury could be ordered to come from another vill, or hundred, the king's court having power to summon jurors from any part of the county (*Year-Book, 31 Henry VI. 39*). And so if the case interested a corporation in the vill or the hundred itself, the jury would come from the next hundred (*31 Assize, 19*; *15 Edward IV. 18*).

<sup>1</sup> Bract. 184.

“speak the truth. So help me God, and these holy gospels.” After this, the other jurors, in order, repeated the following words:—“That oath which the foreman here hath taken,<sup>1</sup> I will keep on my part, so help me God, and these holy gospels.”<sup>2</sup>

After the oath was taken in the foregoing manner, the prothonotary, for the information of the jurors, was to rehearse the effect of the writ, in the following way:—“You shall say, upon the oath which you have taken, whether *N.* unjustly, and without a judgment, disseised *B.* of his freehold in such a vill, after the last return of the king, &c., or not” (*a*). In this situation of things the justices were to say nothing towards instructing the jurors, because nothing had been said by way of exception against the assize; but the jurors were to retire into some secret place, and there to converse with one

(*a*) It is to be observed that nothing is said about evidence, the reason being, that even in the time of Bracton (from whom all this is taken) the jurors were still considered as witnesses, and the course of procedure had not yet gone so far as to allow of evidence being adduced. The jurors, therefore, were left to decide upon their own knowledge, and of course great difficulties arose, for none of them, or only some of them, might know anything at all about the matter; and though, as they came from the vicinage, it was most probable that some of them might know something about it, it would probably be in a great degree hearsay, or, at the best, common understanding. The course of procedure taken in the almost certain contingency of the jurors either being in doubt or at variance among themselves upon the matter may well be illustrated from some passages in the *Mirror*, the author of which lived and wrote in the same age as Bracton. From these passages, it would seem that the course was this: that if no two among them could agree for the plaintiff, he failed, but that if any two of them could speak on his oath in his favour, then (unless others could speak positively the other way) that would suffice for the plaintiff, provided that it was found upon examination that they agreed as to what was the pith and point of the action. Thus it is said: “It is an abuse to count of so long a time (*i.e.*, in writs of right), whereof none can testify the hearing or seeing, which is not to endure generally above forty years. It is an abuse that they examine not the jurors, although they find at least two agree. It is an abuse to compel jurors—witnesses—to say that which they know not, by distress of fine and imprisonment, when they could not say anything. It is an abuse to use the words, ‘to their knowledge,’ on their oath, to make the jurors speak upon thoughts, since the chief words of their oath be that they speak the truth.” Elsewhere it is said that two credible witnesses are sufficient, and the usage is that the affirmative party in aid of the court cause the nearest credible neighbours to appear in witness, so that there be twelve men at the least of the jury (of ancient time ordained to be of the assize), of which, if two are agreed, by verdict of them and of the others, or if, by good examination, all the jurors be of one assent, it is sufficient. And if not, or if all the jurors say generally that they know nothing, or doubt of the matter, or if they say not expressly against the defendant, or if they speak for the defendant, in such cases it is to be adjudged against the plaintiff that he proveth not sufficiently his case. And although the defendant would make other defence, he shall not be suffered to do so (*Ibid.*) It is added that only against jurors hold challenges, as witnesses, as that the juror has been convicted, or indicted, or be friend, cousin, or ally of the opposite party, or because he is within age, or has procured himself to be put on the jury; and if the challenge be denied, it is to be tried by the jurors. So elsewhere, in disseisin, if the jurors in petit assizes are agreed that one shall give their common verdict for all, and if they say that they know nothing, then the plaintiff shall receive nothing, because he proved not his case; and if they be of different opinions, they are not, therefore, to be threatened or imprisoned, but are to be severed, and diligently examined. And if two jurors be found to agree among all the rest, it sufficeth for him for whom they speak; and they are not to be examined upon the title, as it is sufficient for the judge to know if the plaintiff were disseised (*c. iii. s. 23*).

<sup>1</sup> *Talis primus hic.*

<sup>2</sup> Bract. 184 b., 185 b.

another upon what they had in charge, and no one was to have access to them, or talk with them, till they had given their verdict; nor were they, on the other hand, by signs or words, to give the least intimation what their verdict was to be.

There often happened a difference of opinion between the jurors, in which case the court used, as it was called, to *afforce* the assize; that is, others, according to the number of dissenting voices, were added to the major part of the assize, and if they happened to agree, their verdict was held good; and the dissenting jurors were to be amerced *quasi pro transgressione*, says Bracton, as guilty of a sort of offence, in obstinately maintaining a difference of opinion.

When the verdict was given, judgment was delivered according to it, unless the jurors should have expressed themselves obscurely, and the justices were disposed to examine further into the matter; and should the jurors, or those who were added by afforcement, still be unable to declare plainly and fully what their meaning was, the method was either to get the parties to agree the matter, or the judgment was adjourned into the great court, where it was finally to be determined. Another way of putting a point of doubt and obscurity into a course of examination, was by *certificate*, the nature of which will be explained hereafter. When the assize failed to give a plain and intelligible verdict, it was the office of the justices to endeavour to elucidate it by interrogation and discussion. If the jurors were entirely ignorant of the matter, then, as in the former case, others were to be added who knew the truth; and if, after that, the truth could not be got at, they were to give their verdict upon the best of their belief, according to their consciences.<sup>1</sup> Though it was commonly said, that truth was the province of the juror, and justice and judgment that of the judge; it seems, says Bracton, that judgment belongs to the jurors, inasmuch as they are to say upon their oath whether one man disseised another. But yet, as the judge is to give a just judgment, it becomes him diligently to weigh and examine what is said by the jurors, to see whether it contains any truth, that he may not himself be misled by their mistakes.<sup>2</sup>

If judgment was given for the complainant, the land was to be restored, with all its produce, received and to be received, from the disseisin to the time of the judgment; and, as the sheriff was commanded to keep the land in peace till the assize was taken, the disseisee was to recover damages for any unjust abuse or misuse of the land in that interval. The disseisor was to suffer certain penalties (a). He was to be *in misericordiâ regis*, in proportion

(a) In the *Mirror* it is said to be an abuse that plaintiffs did not, as formerly, recover not only damages of the issues of the possession, but recovered costs as to the injury, and as much as one might lawfully (i.e., reasonably) tax by the occasion of such a suit (c. v. s. 1). Elsewhere it is said: The jury ought to inquire of the damages—that is to say, of the profits of the tenements since the disseisure, and to whose hands such profits came, and of the charges, costs, and reasonable expenses

<sup>1</sup> Bract. 185 b., 186 b.

<sup>2</sup> *Ibid.* 186 b.



to the nature of the disseisin; as, whether it was *cum armis* or without, so as the *misericordia* was never less than the damages: besides this, he suffered a penalty for the peace, if it had been violated. Again, if he had committed robbery with the disseisin, he suffered a triple penalty; for the disseisin, the *misericordia*; for the peace, imprisonment; and for the robbery, as it is termed by Bracton, a heavy redemption: he did not, however, lose life or limb, as the robbery was not prosecuted criminally. The disseisor, if he was the principal in the fact, was also to give to the sheriff, on account of his disseisin, an ox and five shillings; but those who were only in aid, force, or council, did not, in general, pay this mulct to the sheriff, though in some counties they did. The disseisor was also to render damages, to be estimated by the oath of the jurors, and further, if need were, or the jurors had been excessive, to be taxed by the justices. But the justices were not to estimate the damages at a larger sum than the jurors had, unless it was a very clear case that the jurors had taxed them much lower than was reasonable or proper.<sup>1</sup>

This liberty of increasing the damages was allowed to the judges, in order that disseisins might never escape the proper punishment of the law; for, in those times of disorder and oppression, there were many great men who would commit disseisins for the mere purpose of making the most of the fruits and profits during the time they could keep their unlawful possession; and when they had raised great sums thereby, they could generally escape with a small *misericordia*, through the ill-placed lenity of jurors; who, when they, by their verdict took from a disseisor the land, were unwilling to load him besides with heavy damages. For these reasons, it was expected that the justices should examine very carefully into the change that had been made on the land since the disseisin, either through the wilfulness or neglect of the disseisor, or any otherwise; all which he was to be compelled to make good, notwithstanding much of the damage might have happened by death of cattle and other accidents, which it was out of his power to govern; nor was any allowance to be made to a wrong-doer for improvements.<sup>2</sup>

This was the manner of proceeding, when nothing was said against the assize, nor any exception taken why it ought to remain, as it was called; but if the tenant did not choose to put himself upon the assize, he might *except*, or plead such matter as would cause it to remain, that is, defer it for the present, or perhaps entirely destroy it. These exceptions were,

which the plaintiff hath sustained in his recovery, and in all things, and how much he is damaged in distress of his goods and in his honour; and, the damages being assessed, it is to be awarded that the plaintiff recover his seisin, such as it is, according to the view of the recognitors, and the damages, and the disseisors are punishable according to their offences (c. iii. s. 25).

<sup>1</sup> Bract. 185 b., 187.

<sup>2</sup> *Ibid.* 187.



to the writ, to the person of the complainant or tenant, and to the assize. Some exceptions to the writ deferred the assize, but did not destroy it; some exceptions to the person of the complainant entirely destroyed the assize; some exceptions were peremptory as to one person, and deferred the judgment, but were not peremptory as to another; as where the complainant was not entitled to the action, but some one else. The order of stating exceptions was this: if the writ was not good, there could be no further proceeding; but if that was good, then they resorted to the person of the complainant, to see whether he was entitled to the complaint; then to the person of the tenant, to see if he was the person against whom the complaint should be made; and last of all to the assize, to try *si tenens injustè et sine judicio disseisiverit ipsum querentem de libro tenemento suo* in such a vill, after such a period of time.<sup>1</sup>

Thus, after the jurisdiction of the court was established, the tenant was to take his exceptions to the writ. Exceptions to the writ were many; if there was anything faulty therein, a spurious seal, a rasure in a suspicious part, as where the names of the persons, or places, or things were written (for a rasure in the legal part was not so important as in these points of fact); if the date was at all changed; if the complainant had a former writ of mort-auncestor, of entry, or of right, and so had not observed the order of writs. Again, any error destroyed a writ, though he did not destroy the assize. It was error, if the writ was against one who was possessed *nomine alieno*, as a *firmarius*. The assize could not proceed if there was an error in the name, as *Henricus* for *Wilhelmus*; and so in the cognomen, as *Hubertus Roberti* for *Hubertus Walteri*; so in the name of a vill whence a person took his description, as London for Winchester; even if the error was in a syllable, as *Henry de Brocheton* for *Henry de Bracton*; nay, even in a letter, as *de Bracthon*, for *de Bracton*: again, in a name of dignity, as *Henry de Bracton præcentor*, when he was *decanus*; so of a thing, as *vineam* for *ecclesiam*.<sup>2</sup>

Then followed exceptions to the person of the complainant; one of which was villenage, and its consequences, excommunication; that he had not a freehold; that he should distrain instead of bringing this writ, and many others. The tenant might next except to his own person; as for instance, that the action should have been against his ancestor or predecessor, and not against him.<sup>3</sup> And last of all, having gone through exceptions to the writ and to the person, he might except to the assize, upon the circumstances of the case, by disputing how far the operative words of the writ were justified in fact; how far he *injustè et sine judicio—disseisivit eum—de libero tenemento suo—in tali villâ*; every term of which charge was open to a variety of remarks and objections.<sup>4</sup>

All these exceptions, whether they were peremptory or dilatory,

<sup>1</sup> Bract. 187 b.

<sup>3</sup> *Ibid.* from 190 to 204.

<sup>2</sup> *Ibid.* 188, 189.

<sup>4</sup> *Ibid.* from 204 to 212 b.

were equally *out of the assize* (which was merely to try the disseisin), and collateral to it ; and therefore could not be determined by the recognitors of assize. We have seen, that in Glanville's time<sup>1</sup> such incidental matters were in general tried by duel, there being very few issues which are said by that author to have been usually tried by recognition ; of which one was, *infra citatem vel non* ; another was, whether seised *ut de radio*, or *ut de facto*, and some others ; as that of villenage, which was to be tried by the relations, and if they could not agree, by the vicinage ; the gift of a fee, after a grant of the advowson,<sup>2</sup> and others that may be seen in that reign ; but, in general, points in debate that did not make the direct question of seisin, were tried by the duel. Since that time, the good sense of mankind, concurring with the statute made by Henry II. concerning trials by recognitors, had so far prevailed over the habits of their ancestors, that suitors used commonly, when a fact was in litigation between them in a cause, to consent that *the truth thereof should be inquired of by a JURATA, or jury*, in preference to a trial by duel ; and they accordingly used to *pray* the court that it might be so ; with which prayer courts had been so long used to comply, that a jury had become the regular mode of trying a fact in dispute in a judicial proceeding. Thus there had gradually arisen a new sort of trial by recognitors or jurors, denominated a *jurata* ; which was a tribunal chosen by consent of the parties themselves, and, on that account, differing somewhat in its constitution, design, and effect, from the *assisa*.

To mention only one mark of their difference, and leave the rest to be observed as occasion presents them : the *jurors* in a *jurata* were not liable to conviction for perjury, nor to the infamous judgment as the jurors in the *assisa* were ; the reason for which, according to Bracton, was, because the *jurata* was a trial which the parties had themselves prayed to have, and therefore they had no reason to complain of its determination ; while the assize (to follow his idea) was a specific remedy in a special case, to which, and which only, the parties were by the law confined for obtaining redress ; and if the ends of justice were disappointed by those recognitors who were designed by the constitution to further it, they deserved a very severe animadversion. But, with submission, the reason of the conviction being allowed in one case, and not in the other, was not, it would seem, owing to any particular difference in these two trials, as practised in the time of Henry III., but because the constitution of Henry II. (a) had provided that punishment for recognitors

(a) There was no such "constitution," nor does Glanville say there was. Glanville calls it, indeed, an institution, and, for the sake of flattery, calls it a royal institution ; but there can be no manner of doubt that it was simply an ordinance or regulation of the chief justiciary : just as, in the time of the Conqueror, we find the king's justiciary ordering twelve men to be sworn to try a real action. That was an assize, for an assize was only trial by jury in a real action (i.e., an action to recover real property), and the truth is, the institution had grown up by degrees, and had only been

<sup>1</sup> Bract. 146.

<sup>2</sup> Glanv. lib. 13, c. 20.

in the particular *assizes* only, which were then invented. The devolving of questions upon recognitors to be tried by the consent of parties, was a practice that originated afterwards, and therefore was not within that provision: nothing can be a stronger mark of this trial not owing its existence to that famous law of Henry II. than the appellation of *jurata*.

The difference between *assisa* and *jurata* was a very common piece of learning in this reign. This distinction was always observed, and was never more nicely attended to, than when it happened, as it sometimes did, for an *assisa* to be called upon to discharge the office of a *jurata*; and, instead of deciding the direct point in the action, to inquire of some collateral matter. For when any issue arose upon a fact in a writ of novel disseisin, mortdancestor, and the like actions, which fact the parties agreed should be inquired of by a *jurata*; nothing was more natural, nor indeed more commodious, than, instead of summoning other recognitors, as in Glanville's time,<sup>1</sup> (a) that the *assisa* summoned in that action should be the jurors to whom they might refer the inquiry. This *Assisa vertitur in juratam.* was generally the case; and then the lawyers said, *cadit assisa, et vertitur in juratam*; the assize was turned into a jury, and the point in dispute was determined by the recognitors, not *in modum assise*, but *in modum jurate*.

Thus, then, the exceptions mentioned above would in this reign, as they were out of the assize, be determined, not *in modum assise*, but *in modum jurate*: as it were, says Bracton, by consent of the parties; where one alleged one thing, and the other the contrary, and each prayed that the truth of what he said might be inquired of. And in this case, says he, there is no conviction; for if the other party would controvert the saying of the jurors, the law gave him full liberty to say that the *proof was false*; the verdict of the jurors in this case being only a *proof of the exception*; every one being to prove the truth of his exception, and the person who replied to it being also bound to prove his replication, in which recourse was had to the jurors, merely for want of other proof.

This will be made clearer by giving an instance. Suppose the complainant stated his case by saying, that he married a wife

regulated by Glanville, who, all through, speaks of the recognitors as "jurors"—that is, sworn triers on their own knowledge. And the distinction on which our author dilates in the text between a jury and an assize is futile, for they were different names for the same thing, the assize being a jury to try the right to seisin, the trial by jury being applicable to any issue.

(a) No trace of any such distinction can be found in Glanville, who, all through, speaks of "recognitors" as "jurors," and of the assize as a trial by jury. The assize was, as already shown, simply trial by jury in a real action, which had grown up since the Conquest, and was regulated by Glanville and elaborated by Bracton. And the formalities and subtleties in which Bracton indulges are simply illustrations of the tendency of men whose minds are cramped by a special study to overload it with senseless niceties and verbal distinctions. It is only to be regretted that our author should have wasted so much space upon them.

<sup>1</sup> Glanv. lib. 13, c. 20.

having an inheritance, and after her death he was in seisin till such a one unjustly disseised him, and so was in seisin *per legem Angliæ*, for he and his wife had children between them. If the tenant did not, in answer to this, deny the disseisin, and put himself on the assize, to try whether he disseised him or not, he might deny some of the circumstances which the complainant had stated as making his title: he might except that they had no child; or if they had, that it died in the womb; or if it was born, that it was a monster, and not a child; or if it was a child and born alive, that it was not heard to cry between four walls: when the complainant to such a plea replied the contrary, the truth of the allegation was then to be inquired of by the assize *in modum jurate*. In the former case, of the general issue *disseisivit vel non*, the jurors, if they swore falsely, would be liable to conviction; in the latter they would not.<sup>1</sup>

The instances in which an assize might be turned into a jury were as numerous as the exceptions that might be taken to the complaint. We shall content ourselves with adding one more example to those already given; and this being a very particular one, deserves our notice. An assize was sometimes turned into a jury, *propter transgressionem*, on account of a trespass: as where a person made use of another's land against the owner's will; or where he used, as his own, the land of a person holding in common with him; these might be disseisins and trespasses both; for every disseisin was a trespass, though not every trespass a disseisin. If then the entry upon the stranger's land was without any claim of right, it was not a disseisin, but a trespass. But as it was uncertain *quo animo* this was done; the complainant used generally, in such case, to bring an assize as for a disseisin, and then the judge was to examine whether it was done with a claim of right: so that, if it should turn out that he made the entry through a probable error and ignorance, and under such mistake cut down trees, or the like, and did not do it in the name of seisin, he was cleared of the imputation of a disseisin, and it was considered rather as a trespass; for which, if he acknowledged the fact, he was to make amends; if he denied it, the assize was turned into a jury to inquire of the trespass.<sup>2</sup>

An assize was sometimes turned into a jury *propter transgressionem districtionis*, on account of a trespass committed in distraining; for a distress sometimes amounted to a disseisin, sometimes was only a trespass: and was accordingly determined, in the former case *in modum assisæ*, in the latter *in modum jurate*. When an assize, therefore, was brought upon an injury suffered by a distress, if it could not be maintained as an assize to determine the disseisin, it might be maintained as a jury to determine the trespass.<sup>3</sup>

From what is here said, and the little mention there is in Bracton

about any original specific proceeding in case of trespass, it should seem, that though there might be a writ of trespass, it was rarely brought for entries upon land; but the usual way of considering such matters was in an assize, where the complainant was sure of inflicting some penalty on the wrong-doer, either as a disseisor or a trespassor. It should seem that the writ of trespass was a late invention, not wholly approved by Bracton; for it is said in another part of this author's work, that the writ *quare vi et armis* a person entered land, would be bad, *because* it would be making a question of the *mode* of the trespass, when it should be for the trespass simply.

To return to the assize of novel disseisin: This assize, according to Bracton, had three considerations: it was personal, *propter factum*; penal, *propter injuriam*; and thirdly, it was for restitution of the thing taken. As far as its object was penal (and *pœna suos tenere debet autores*), it did not lie for the heir of the disseisee, nor against the heir of the disseisor, if he died in the life of the disseisee; for the penalty was extinguished with the person, and the heir was not to be punished for the offence of his ancestor: nor, in like manner, would an action lie for the heir of the disseisee; for as between him and the disseisor there was no obligation *quoad pœnam*, though there was *quoad restitutionem*; but his remedy was by a writ *de ingressu*, since called a *writ of entry*. As to this writ of entry, and when it lay in the nature of an assize of novel disseisin, for an heir to recover possession, it was to be seen whether the ancestor had been properly diligent in procuring and prosecuting his suit so as to have got a view, and the jurors sworn; for then, by so doing, the assize of novel disseisin, in case of his death, was said to be perpetuated; that is, the right of action for the disseisin, so far as concerned the restitution, continued to the heir of the disseisee against the disseisor and his heirs. Some were of opinion, that, in this case, the action would hold *quoad pœnam* likewise against the disseisor; and though the assize was not prosecuted so far as the view, and electing the jurors, yet if as much diligence as possible had been used, though no action was commenced, the writ of entry was nevertheless continued to the heir of the disseisee *quoad restitutionem*.<sup>1</sup>

The form of the writ of entry, when brought after an assize, was as follows: *Præcipe A. quodd justè, &c., reddat B. tantum terræ cum pertinentiis in villâ, &c., in quam non habet ingressum nisi per C. patrem ipsius A. cujus hæres ipse est, qui prædictum B. inde injustè et sine judicio disseisivit, et postquam, &c., et unde assisa novæ disseisince summonita fuit coram justitiariis nostris ad primam, &c., et visus terræ captus, et remansit assisa capienda, eo quod prædictus C. obiit ante captionem illius assisæ* (or, *antequam justitarii nostri in partes illas venerint*). *Et nisi fecerit, &c.* These writs of entry, grounded upon a disseisin, varied according to the circumstances which had happened since the disseisin. One

<sup>1</sup> Bract. 218 b.

was, *in quam ingressum non habet nisi per C. filium et heredem D. qui terram illam ei dimisit postquam idem D. injustè et sine judicio disseisiverit ipsum B., &c.* Another was, *in quam non habet ingressum, nisi per talem, qui injustè et sine judicio disseisivit talem postquam idem talis disseisiverat querentem.*<sup>1</sup>

In this writ the heir of the disseisor might have almost all the answers and defences which the disseisor himself, if he had lived, might have had against the assize of novel disseisin; inasmuch as this writ was in the nature of an assize of novel disseisin in all respects that regarded restitution, though not *quod panam*; and all such matters would be determined by a jury. Bracton says expressly, that no corporal pain was to be inflicted by this action, on account of the disseisin of the ancestor; nor damages; nor was the customary ox to be given to the sheriff;<sup>2</sup> but only the *misericordia* was to be paid for the unjust detention.<sup>3</sup>

This writ of entry grounded upon a disseisin, like other writs of entry, was an invention since the time of Glanville, and was the result of that refinement which had pervaded all parts of the law relating to *seisin* and *property*. The earliest mention of these writs is in the third year of this king; when they are spoken of as in common use, and therefore it is probable that they were introduced not long after Glanville's time.<sup>4</sup> We shall have occasion to treat more particularly of these new writs in their proper place. The writ which next presents itself is another remedy concerning possession, which also had been contrived since Glanville's time (*a*), and has since been called the writ of *Quare eiecit infra terminum*.

Such were the notions concerning land, that while one person had a freehold in a tenement, another might, says *Quare eiecit infra terminum*. Bracton, have at the same time the usufruct, the

(*a*) This particular form of remedy may have been framed since this, but, as already has been seen, there was a remedy before, for it is laid down distinctly in the *Mirror* that, as the assize of novel disseisin was a possessory remedy, it lay equally for a termor for years as for a freeholder. They were not so dull in those days as not to see that a term of forty years might be as good or better than an estate for term of life; neither were they so foolish as to afford no remedy for it. It is quite probable that some over-technical lawyer may have suggested a quibble upon the word "disseisin;" that, as a termor was not seised, so he could not be disseised—a futile point, for the term 'seisin' meant possession." However, there is reason to believe that some such technical difficulty had been raised, for the *Mirror* puts it as an "abuse to think that we cannot recover a term for years in manner of disseisin" (*c. v. s. 7*). In the chapter on disseisin, it is laid down that disseisin included deforcement, or *keeping out*, as well as ejectment, or *putting out*, and that it was "to disseise or eject a tenant as if one eject me out of my tenement, whereof I have had peaceable possession by descent of inheritance, or other lawful title to the possession. And note, that right is of two kinds: of possession or of property; and the right of property is not determinable by this assize as is the known possession, or that which altogether savoureth of a possessory right. And ejection, if of a term of years, falleth into this assize, which sometimes cometh by lease" (*c. iii. s. 20*). Now in what did the writ of disseisin differ from the writ of *quare eiecit terminum*, except that, to satisfy some captious clerk, the word disseisin was omitted, and the words "quod demisit" and "quod deforceat" were substituted.

<sup>1</sup> Bract. 219.

<sup>2</sup> It seems that there was a custom for the sheriff to demand an ox for every disseisin proved.

<sup>3</sup> Bract. 220.

<sup>4</sup> *Ibid.* 219.

use, and the habitation.<sup>1</sup> As we have been showing how a man was to be restored to his freehold if he was ejected, we shall now see what was to be done if a person was ejected before the expiration of his term in the usufruct, use, or habitation of a tenement which he held for term of years. Such persons, when ejected within their term, used sometimes to bring a *writ of covenant*; but as that only lay between the person taking and person letting (who alone were parties to and bound by the covenant), and the matter could not be determined, if at all, but with great difficulty, in that way; provision was made, says Bracton, by the wisdom of the court and council<sup>2</sup> for a farmer against all persons whatsoever who ejected him, by the following writ: *Præcipe A. quòd justè et sine dilacione reddat B. tantum terræ cum pertinentiis in villâ, &c., quam idem A. qui dimisit, &c.*, or thus: *Si talis fecerit te securum, &c., ostensurus quare deforceat, &c., tantum terræ cum pertinentiis in villâ, &c., quòd talis dimisit ipsi, &c., ad terminum qui nondum præterit, infra quem terminum prædictus, &c., illud vendidit, &c., occasione cujus venditionis ipse, &c., postmodum, &c., de prædictâ terrâ ejecit ut dicit; et habeas ibi, &c.*, or, *Si A. fecerit te securum &c., tunc summonere B. quòd sit coram, &c., ad respondendum eidem A. quare injustè ejecit eum de tanto terræ, &c., quam C. ei dimisit ad terminum qui nondum præterit infra quem terminum, &c.*

If this writ lay against a stranger *propter venditionem*, much more ought it to lie against the person himself who demised the land, if he ejected his own farmer. In such case the writ was, *quam C. de N. ei dimisit ad terminum qui nondum præterit, infra quem terminum prædictus C. de eâdem firmâ suâ injustè ejecit, ut dicit; et nisi fecerit, &c.*, and this was with little variation, the more common form in case of ejectment by a stranger. These writs were drawn in two ways, both of which we have noticed in the above instances; the one of a *præcipe*; the other two of a *si te fecerit securum*. The *præcipe* was thought the best and most compendious proceeding, on account of the process of caption of the land into the king's hands, which lay upon that writ; and the avoiding the tediousness and delay of attachments, which was the process upon the writ of *si te fecerit securum, &c.*, though we shall see, in aftertimes, that the latter became the most common and best known of the two, being that which, from the words of it, was called a *quare ejecit infra terminum*.<sup>3</sup>

Thus have we gone through the remedies which the law had provided, where an injury was done to a man's seisin of a freehold. It follows next in order to speak of injuries done to a seisin of things appurtenant to a freehold, such as common of pasture, and the like. We have seen, that in Glanville's time there was an assize of common of pasture, by which the complainant might recover his seisin of a common, the same as

<sup>1</sup> These terms *usufructus*, *usus*, and *habitatio*, are borrowed from the civil law, and there stand in as near a relation to each other as they are placed in here (*Inst.*, lib. 2, tit. 4, §). <sup>2</sup> *De concilio curiæ provisum*. <sup>3</sup> Bract. 220.



seisin of his land; and that there was a writ directing an admeasurement of pasture to be made, where any one had surcharged the land. The forms of these two writs were the same now as in his time.<sup>1</sup> The writ of admeasurement was executed by the sheriff, who was to go in person to the place where the common lay, and cause the hundredors and all who were interested in the admeasurement to meet; and there, in presence of the parties to the writ, if they obeyed the summons to appear, and after hearing their allegations, he was to make inquiry, by the oaths of such neighbours by whom the truth could best be known, and by the inspection of charters and instruments, how the right was; and, according to that, he was to admeasure and allot the common.<sup>2</sup> This was the writ upon which admeasurements were usually made. But where a person overcharged his common beyond what his ancestors had ever claimed, the admeasurement used to be made by a writ, invented since Glanville's time, to the following effect: *Si A. fecerit, &c., tunc, &c., quòd sit coram justitiariis ad primam assisam, ostensurus quare superonerat, &c., aliter quàm C. pater ipsius B. cujus hæres ipse est, consuevit*: upon which the justices were to proceed as the sheriff in the former instance did, and a summary inquisition was made concerning the matter in dispute.<sup>3</sup>

Another writ had been introduced, called a writ *de quo jure*. Where a person had recovered seisin of a common in assize, grounding his title upon usage and sufferance merely; as this determined only the seisin, the chief lord might bring this writ to make the tenant show *quo JURÈ exigit communiam pasturæ, &c., desicut ille nullam communiam habet, &c., nec servitium ei facit quare, &c., habere debeat, &c.*<sup>4</sup>

The writ in Glanville to the sheriff, commanding him that *præcipias R. quòd, &c., permittat habere H. aisiamenta sua, &c.*,<sup>5</sup> was preserved, with some small difference in the form. He was directed, that *justicies R. quòd, &c., permittat H. habere rationabile estoverium, &c.*, as the case might be, of wood, turbary, and the like.<sup>6</sup>

As a nuisance, being an injury to a freehold, was considered in the nature of a disseisin, and like that might be redressed by an assize; so also, like that, it might, *Of nuisance.* *flagrante facto*, be removed by the party injured without any ceremony of application to the law: but after the party had laid by, he had, as in case of a disseisin, no redress but by writ.<sup>7</sup>

There is no mention in Glanville of any other writ of nuisance than the assize. We find now several writs to the sheriff upon questions of nuisance. One of these was *Questus est nobis talis, quòd talis injustè et sine judicio levavit quendam murum* (or whatever it might be) *ad nocumentum liberi tenementi sui, &c., post reditum nostrum de Britannia in Angliam*:<sup>8</sup>

<sup>1</sup> Vide ante, 190; Bract. 224 and 229.

<sup>2</sup> Ibid. 229.

<sup>3</sup> Ibid. 229 b.

<sup>4</sup> Ibid. 229 b. 230.

<sup>5</sup> Glanv. lib. 12, c. 14. Vide ante, 174.

<sup>6</sup> Bract. 231.

<sup>7</sup> Ibid. 231 b.

<sup>8</sup> We have before seen that by the Stat. Mert. writs of novel disseisin were not to exceed *primam transfectionem domini regis qui nunc est in Vasconiam*. Vide ante,



*Et ideo tibi præcipimus, quod loquelam illam audias et postea eum inde justè deduci facias, ne amplius, &c.* In the same manner writs might be formed, *quare, &c., postravit injustè ad nocumentum liberi tenementi; quare, &c., viam obstruxit, &c., quare divertit cursum aque, &c.,* and so on, in numberless cases of injury and nuisance to a man's freehold.<sup>1</sup> These last writs authorised the sheriff to hear and determine the matter; and so were to all intents and purposes writs of *justicies*, though that word was introduced only in the following: *Justicies, &c., quodd, &c., permittat H. habere quandam viam in terrâ suâ, &c.* The writ of assize of nuisance did not differ in form from those in Glanville, except in the return now used in all assizes, *coram justitiariis nostris ad proximam assisam.*<sup>2</sup> The proceedings upon this writ were the same as in an assize of novel disseisin of a freehold. So much were assizes of common and of nuisance considered in the same light as assizes freehold, that where either of the parties died after the injury done, and the writ was to be brought by or against the heir, we find a sort of writ of entry was formed, in the nature of those we before mentioned for recovery of lands: *Præcipe quodd, &c., reddat B. communiam pasturæ, &c. Præcipe quodd, &c., relevari faciat et reparari quoddam fossatum, &c.* *Præcipe quodd permittat talem relevare, &c.*<sup>3</sup> adapted, in the words of them, to the nature of the case, without any mention of an entry, which indeed would have been incoherent and absurd.

A nuisance was so much in the nature of, and approached so near to, a disseisin, that sometimes it might be considered in either light; and it was difficult to say which it properly was. Suppose a person caused water to overflow; if it rose upon the complainant's own freehold, which it most probably would if he had land on both sides, this was thought rather a disseisin than a nuisance; but if it rose only on the freehold of the wrong-doer, and from thence incommoded that of the complainant, it was then only a nuisance, because the fact was all in the wrong-doer's land. But if part was in one, and part in the other, and the water run over both grounds; then, for one part he might have an assize of novel disseisin of freehold; for the other, an assize of nuisance; so that here would be two assizes on account of the same land; in which case, of the two remedies, if one was to be chosen, Bracton advises the assize of nuisance, as the most likely to remove the whole mischief: for the assize of novel disseisin, as it was confined to the freehold, could not correct the nuisance which was upon the other's land; while the assize of nuisance, by removing the cause, effected both.<sup>4</sup> A man might commit a disseisin and two nuisances, by doing one fact on his own ground. If he cut a ditch across a road which led to a pasture, he, at once, committed a disseisin of the common;

264. Notwithstanding which, we find Bracton states this writ with a different limitation. It is not easy to account for this want of agreement between our author and the statute. *Vide ante, 325.*

<sup>1</sup> Bract. 233.

<sup>2</sup> *Ibid.* 253 b.

<sup>3</sup> *Ibid.* 235 b., 236.

<sup>4</sup> *Ibid.* 234 b.

caused also one nuisance by obstructing the way, and another by diverting the water from its proper channel.<sup>1</sup>

Among other nuisances, a liberty or franchise might be a nuisance to another liberty or franchise; as where the liberty of holding a market was granted, so as not to become a nuisance to a neighbouring one. Now, a market was said to be *vicinum*, or neighbouring, if it was six miles and a half,<sup>2</sup> and one-third of the other half distant from another; which distance was computed with a view to the following considerations: supposing a day's journey to be twenty miles, and the day was divided into three parts, the first part would suffice for the journey thither; the second, for buying and selling; and the third, for returning home in reasonable time before night. A market if raised within this distance, was to be put down; yet a market to be held two or three days *after* another, though within that distance, could not be said to be injurious; and, accordingly, a market was not considered as a nuisance,<sup>3</sup> unless it was held before or at the time of another.

Before we take leave of assizes of novel disseisin, it will be necessary to remark two or three particulars relating to them in general. If a disseisin happened *infra summonitionem justitiariorum*, there was no need of applying to the *curia regis* for a writ; but the itinerant justices would make one themselves, in this form: *Talis de tali loco, et socii sui justitiarum itinerantes in tali comitatu tali salutem. Questus est nobis*, and so on, as in other writs; only, instead of the term of limitation, these words were inserted, by way of giving jurisdiction to the court, *infra summonitionem itineris nostri*.<sup>4</sup>

We have seen what provision was made by the statute of Merton in case of re-disseisin.<sup>5</sup> If a person recovered seisin by judgment of the justices itinerant, and was put in seisin by the sheriff, and was afterwards disseised by the same disseisors; they, being convicted thereof, were to be taken and detained in gaol, till released by the king or otherwise; and for the purpose of taking the offenders there issued the following writ to the sheriff: *Monstravit nobis talis, quod cum ipse recuperasset*; mentioning the assize, and so on; *ipse talis, &c., iterum, &c., disseisivit: et ideo tibi precipimus, quod assumptis tecum custodibus placitorum coronæ nostræ, et 12 tam militibus quam aliis liberis et legalibus hominibus, &c., diligentem facias inquisitionem, &c. (a) Et tunc ipsum capias, et in*

(a) Upon this the sheriff was judge, and the question was raised long after this whether he, being judge, his return of the jurors could be objected to, and it was held that it could not. "Suppose a re-disseisin directed to the sheriff, there he shall be judge and also minister; and in the writ he will inquire of those who were of the assize, and others, and he also shall make process against them, and he is judge, and executes his own judgment; yet it is no challenge to his array that he is favourable, for he is judge, and it shall be presumed that he is indifferent (*Year-Book*, 8 *Henry VI.* fol. 21).

<sup>1</sup> Bract. 234 b.

*Sex leucæ.* Spelman says, that in Domesday, and our old writers, *leuca* signifies a mile. Spel. *Voce Leuca.*

<sup>2</sup> Bract. 235.

<sup>3</sup> *Ibid.* 236 b.

<sup>4</sup> *ante.*

*prisonā nostrā salvò custodias, donec aliud inde præceperimus, et inde tali seisinam suam rehabere facias, &c.* And, in like manner, in all cases where seisin was recovered in court, whether by assize, recognition, jury, judgment, concord, or otherwise, and the recoverer was turned out, a writ of *monstravit* to this effect might be had.<sup>1</sup>

Next, as to the writ of execution to give seisin to the complainant. When an assize happened, as it sometimes did, to be taken out of the county, and the person who brought the assize complained in the county that he had not yet got his seisin, there issued a writ to the following effect to the sheriff: *Scias quòd A., &c., recovered by assize; et ideo præcipimus, quòd per visum recognitorum ejusdem assisæ, &c., plenariam seisinam habere facias, &c.,* the writ being still varied, according as the disseisin was confessed or otherwise. To every writ was added this clause: *Et etiam pro damnis ei adjudicatis infra quindenam facias ei decem solidos habere, ne inde clamorem audiamus pro defectu, &c.* If seisin had been recovered before the justices in the county, and the complainant was hindered from getting possession by the power of his adversary, he might have the following writ to the sheriff: *Questus est nobis, &c., quòd cum in curiā nostrā recuperāssēt seisinam, &c., idem, &c., non permittit eum uti seisinā suā; or seisinam suam nondum habet, secundum quod ei fuit adjudicata. Et ideo tibi præcipimus, quòd diligenter inquiras qui fuerunt recognitores ejusdem assisæ, et per eorum visum, &c., plenariam seisinam ei habere facias, et ipsum in seisinā suā manuteneas, et defendas; or thus, non permittās, quòd talis ei molestiam inferat, vel gravamen, quominus idem, &c., uti possit seisinā suā, ne amplius, &c.*<sup>2</sup>

We have hitherto spoken of such remedies as were furnished *Assisa ultimæ præsentationis* when a person was disseised of his freehold, or of some easement and right appurtenant to his freehold, and arising out of that of a stranger. We are now to treat of appurtenances and rights which arise in a man's own ground; as of the seisin of a presentation; and when a person was impeded in the use and enjoyment of his own seisin thereof, or that of his ancestor. When a person presented to a vacant church, to which himself or his ancestors had before presented *tempore pacis* (for every one must have a seisin of his own, or of his ancestor who last presented), and was impeded or deforced by any one who contested the presentation; this was to be determined by an *assisa ultimæ præsentationis*, as we before mentioned in the reign of Henry II.<sup>3</sup> As this assize could only be brought by one who had had seisin himself, or whose ancestors, to whom the advowson had belonged, had had seisin, those who held by feoffment, and not by descent, could not maintain it, unless they had, in fact, made one presentation: for they could not claim of the seisin of those whose heirs they were not, in an assize, any more than they could in a writ of

<sup>1</sup> Bract. 236 b., 237.<sup>2</sup> *Ibid.* 237.<sup>3</sup> *Vide ante*, 185.

right; nor could one who held for life, as in dower, or the like; all which persons were redressed by another sort of writ.<sup>1</sup>

The *assisa ultimæ præsentationis*, or the writ of *darrein presentment*, as it was afterwards more usually called, differed in one or two particulars from that in Glanville's time. The present began, *Si talis te fecerit securum*, &c., the former was a simple summons. The present was made returnable; sometimes, according to Bracton, *coram justitiariis nostris ad proximam assisam* (notwithstanding the provision of *Magna Charta* to the contrary;<sup>2</sup> sometimes *apud Westmonasterium*.

The process on this writ was as follows: At the first day each party might esoin himself, if he pleased. If both made default, the suit failed, and the writ was lost. If the disturber only of the presentation was present, the judgment was, *quòd recedat sine die*. If the complainant only was present, then it was first to be seen, whether the disturber had been summoned, or not: if he had, and the summons was testified by the proper summoners, then he was to be re-summoned; but if he had not been summoned, or the summons was not proved, or, upon appearing, he objected that he had not been summoned, or the summons was not a reasonable one, another day was given him; and at that day, if the summons was proved, or not denied, there issued a writ of re-summons, by which he was summoned to hear the recognition that had been arraigned, with the addition of this clause, *et ad ostendendum quare non fuit coram*, &c., *sicut summonitus fuit*, &c. At the day appointed, if he made his appearance, he was not permitted to take such objection to the summons as would delay the assize, whether the first or second summons was proved or not, as the day had been appointed before, and he knew he was to be summoned; and if he did not come, the assize was taken by default, provided the jurors were present. If they were not present, then there issued to the sheriff a writ, which sometimes was, *quòd venire facias*, &c., sometimes, *quòd habeas corpora*, &c.,<sup>3</sup> for the jurors to be present at another day, at which time, if he did not appear, the assize would be taken by default.

Again, if, at the first day of summons, the tenant essoined himself, and had another day given, and did not appear at it, the assize was immediately taken by default, without any re-summons; also, if he appeared, and the jurors not, there was always one esoin on account of the appearance.

In this manner was a re-summons allowed when the assize was taken out of the county, or before the justices specially assigned. But before the justices itinerant in that county *ad omnia placita*, no re-summons, nor the delay of fifteen days, were allowed, if the tenant was in the same county with the church in question

<sup>1</sup> Bract. 237 b., 238.

<sup>2</sup> *Vide ante*, 245.

<sup>3</sup> It does not appear from Bracton what rule governed in the application of one or the other of these writs; much less can it be collected that the *habeas corpora* never issued but after the *venire facias*, as was the course in later times.

at the time of the iter, but the assize was taken by default, the same as an assize of novel disseisin.<sup>1</sup> Again, a re-summons was not allowed as against a person within age, nor a minor, nor where the tenant had been seen in court, and had contumaciously gone away. In short, in every assize but that of novel disseisin, there was at the first day either an essoin or a re-summons; but at another day, there was no re-summons after an essoin, nor, on the contrary, an essoin after a re-summons, but the assize was immediately taken by default, as some said; and Bracton was further of opinion that even the essoin *de servitio regis*, though it lay after an essoin and re-summons in every assize where they lay, would not hold in this assize *ultimæ presentationis*, which, as well as an assize of novel disseisin, was excepted from this essoin for the sake of expedition and dispatch. We have been more particular in this account of the practice of re-summons, because it is applicable to all the remaining assizes of which we shall have to treat.<sup>2</sup>

If, after these summons, re-summons, and essoins, the deforçant did not come, would not answer, or contumaciously left the court, the assize, as we said before, was taken by default. If he appeared, and could say nothing why the assize should remain, it proceeded at once, the deforçant, in this assize, being allowed to call no warrantor, because the assize was taken generally for him who had the right of presenting.<sup>3</sup>

When the complainant and deforçant appeared, and the latter was disposed to say something against the assize, then, says Bracton, it became the complainant to state his case (or *profundare intentionem*, as it was called), and show what title he had to the action; after which the deforçant was to state his exceptions to the *intentio* of the complainant, and show why the assize should remain. The matter of the intention and exception was what constituted the merits of the title, and was collected from the effective words of the writ: *Quis advocatus—tempore pacis—presentavit—ultimam personam—quæ mortua est—ad ecclesiam talem—quæ vacat, cujus advocacionem dicit ad se pertinere*: that is, who was the real patron and owner of the advowson, and that he was not a guardian, or farmer, or tenant for years, who possessed *nomine alieno*, or for life, or by intrusion, or disseisin; who, besides not being properly owners, had never, perhaps, presented, and therefore never had gained seisin of the presentation:—whether he obtained this right in times of quiet and peace, and not by usurpation and oppression: whether the *presentation* was rendered complete by institution: for since the Constitution of the Council of Lateran, ordaining that presentations should lapse to the bishop if the patron did not present in six months, had been adopted in our law, it oftener happened that presentations, not being in time, were disputed:—whether it was a *parson* that was presented; for an assize did not lie of a vicarage or prebend, nor of a chapel: whether his

*death* was natural or civil, as by entrance into religion, resignation, or, what was the same, marriage, or any other act which disabled him from holding his church; and whether it was *vacant*. The question of vacant, or not, was to be determined by the ordinary, who was the proper and legal judge thereof.<sup>1</sup>

From the above-mentioned articles of the writ might be extracted exceptions, both to destroy and defer the assize; but should the deforceant admit them all, he might still except against the assize in various ways. He might say, that the complainant who grounded his assize upon the seisin and presentation of his ancestor, after that presentation made a gift of the advowson, either by itself, or with the freehold to which it was appendant, to the deforceant himself, by a charter, which he there produced; and therefore, that though the ancestor might present, yet he could not for that reason present after. To this the complainant might reply, that after the charter mentioned he presented *N.*, who was admitted, so that the charter was void, and the gift null; and this he could prove by the assize taken *in modum jurator*, unless the deforceant chose to make a *triplicatio*, or rejoinder, and say, that though that charter might be void, and the gift null, by such second presentation of the donor, yet after such second presentation, he made another charter to him confirming the former, which had been invalidated by the second presentation: and this he might offer to prove by the assize and witness named in the charter, if the other party simply denied the charter and confirmation, and did not choose to go on by a *quadruplicatio*, or sur-rejoinder, and say, that after all which was stated, he had since made another presentation.<sup>2</sup> The sense of all this pleading was, that the last exercise of right by presentation overbalanced every consideration arising from the right to make that presentation; and so stood the law, conformably with that deference which was universally shown our old jurisprudence to seisin, or possession, whatever the right to that seisin and possession might be.

It might be excepted that the complainant had aliened the land to which the advowson was appendant, *cum omnibus pertinentiis*, or that he had not in his hands any part of the freehold to which it was appendant, but had lost it all by judgment or by disseisin: for though he might have a right to the freehold and its appurtenances, he was first to recover that before he could present.<sup>3</sup> These and many other matters might be excepted against the assize.

Nothing can better show the nature of this assize, how far it had effect, and where it failed, than some cases determined in this reign. In one of these it was held, that when it could not be proved who made the last presentation, nor the next before, nor the next before that, the plea should proceed upon the mere right and property, by that same writ of assize, without recurring to any writ

<sup>1</sup> Bract. from 240 to 242.

<sup>2</sup> *Ibid.* 242 b.

<sup>3</sup> *Ibid.* 242 b., 243.

of right: a *narratio*, therefore, or count, was immediately to be made of the seisin of an ancestor, and of the right descending to the demandant, as if it had been, *ab initio*, a suit upon the right; and the tenant might, as he chose, put himself upon the great assize, or defend himself by duel. Another case was this: Suppose a man had an advowson of a church, and being in seisin of the presentation, gave it in marriage, and afterwards, before he made any presentation, the donee gave it again to another, and then the church for the first time became vacant; upon which the donor, the first donee, and the second donee, all presented: in this case, the donor would, in an assize for the presentation, be preferred to the other two; for the first donee had no true seisin, so as to transfer the advowson to another; nor could the second donee receive what the first could not give him: and so it was determined in more cases than one, that where a person to whom an advowson was given conveyed it away before he had presented to it, the conveyance was null, because there was no remedy to give it effect.<sup>1</sup>

As persons, in the foregoing instances, having presentations, *Of quare im-* could not go upon any seisin of their own or their an-  
*pedit.* cestors; and in all cases, as those who had by any lawful means acquired a right of presentation, whether by gift or by judgment, for life or in perpetuity, would, if they had not presented before, have been unable to maintain their right in an *assisa ultimæ præsentationis*, or a writ of right of advowson; remedies had been devised some time in this reign by two writs, one called *quare impedit*, the other *quare non permittit*, for so Bracton calls it, though the words of the writ are *quod permittat*. The difference between these two writs of *quare impedit* and *quare non permittit* is thus explained by Bracton: *Impedire est ponere PEDEM IN jus alienum, quod quis habet in jure præsentandi*. When a right, whatever it might be, was accompanied, not with a proper seisin, but a *quasi seisin*, in such case the remedy was by *quare impedit*. But if the person presenting had not even this *quasi seisin*, but clearly none at all; as where a right of presentation accrued by donation, or by reason of a tenement holden for life, as in dower, or *per legem terræ*; or to a farmer by reason of his farm; to a creditor by reason of a pledge, where no seisin nor *quasi seisin* was had; there, as no one could be said, *ponere pedem in jus*, or in a *quasi seisin* (which the person in fact never had), a *quare impedit* would not hold, but recourse must be had to the *quare non permittit*, which purported that the person who had the property, or *proprietas*, did not permit him who was in possession to use his *jus possessionis*.

The writ of *quare impedit* was as follows: *Quia A. fecit nos securos de clamore, &c., pone per vadium, &c., ad respondendum eidem A. QUARE IMPEDIT eundem A. præsentare idoneam personam ad ecclesiam de M. cujus ecclesiæ advocationem idem A. nuper in curiâ nostrâ coram justitiariis nostris apud Westmonasterium re-*

<sup>1</sup> Bract. 245 b., 246.



*cuperavit versus eundem B. per judicium curiæ nostræ ; unde idem A. queritur quòd prædictus B. injustè et contra coronam nostram, or in contemptum curiæ nostræ eum inde IMPEDIT : et habeas, &c.* This was the form of the writ of *quare impedit*, which has rather the appearance of a writ of execution, or at least a judicial process to enforce a judgment in some action, than an original writ. The writ of *quare non permittit* was as follows : *Præcipe A. quòd justè et sine dilatione PERMITTAT B. præsentare idoneam quare non per personam ad ecclesiam, &c., quæ vacat, et ad suam mittit. spectat donationem, ut dicit ; et unde queritur quòd prædictus A. eum injustè impedit. Et nisi fecerit, et idem B. fecerit te securum, &c., tunc summe, &c., quòd sit coram justitiariis nostris, &c., ostensurus quare non fecerit, &c.* From the comparing of these writs, it seems, says Bracton, that the *quare impedit* and *quare non permittit* come to the same thing,<sup>1</sup> in which observation later times have agreed with him ; for the writ of *quare impedit*, which seems to have been very recently introduced, and in a very unfinished state, soon became obsolete,<sup>2</sup> and the *quare non permittit* was continued, and is still in use, under the name, however, of *quare impedit*.

The process in this writ was as follows : If the party did not appear to the summons on the first day, nor essoin himself, then the old practice (before the Council of Lateran, when no time ran in case of vacancy of churches) was to attach the impeder by pledges, and so on by better pledges, and to run through the whole solemnity of the process by attachment ; but since that time, the courts had got into the usage of proceeding with more despatch ; in a way, says Bracton, not warranted by law, yet, as he admits, such as was excused by the necessity of the case, which required that a lapse should be prevented, if possible. This was, in the first instance, to distrain the impeder, either by directing the sheriff, *quòd habeat corpus ejus*, or *quòd distringat eum per terras et catalla, quòd manus non apponat*, or *quòd faciat eum venire. Hoc*, says Bracton, *provenit non per judicium, sed per concilium curiæ*, to disappoint and punish the malice of those who hindered presentations in order that lapses might happen.<sup>3</sup> It seems this process was warranted by the order of the court merely, and it is spoken of by Bracton as an intrenchment on the regular course of proceeding, that was to be excused by the nature of the case. The legislature at length interposed to authorise this proceeding, and settled it somewhat in the manner it is here stated.<sup>4</sup>

If the impeder was within age, and had nothing by which he might be distrained, then the person in whose hands he was, and by whose advice he was directed, was to be summoned : *Ibi habeas B. qui est infra ætatem, et in custodiâ tuâ, &c., ad respond., &c.*

<sup>1</sup> Bract. 247.

<sup>2</sup> Vide 2 West., 13 Ed. I., c. v., where a writ of right, of *ultimæ præsentationis* and *quare impedit*, are mentioned as the only original writs to recover advowsons.

<sup>3</sup> Bract. 247.

<sup>4</sup> By the Stat. Marl. 52 Hen. III., c. xii. Vide post.



It was the opinion of some that the patron only was to be summoned, and not the clerk, because he claimed nothing in the advowson. But in truth, says Bracton, it was first to be seen, whether it was the patron or the clerk that caused the impediment; for both might be impeters at different times; the patron before he lost the presentation by judgment, and the clerk by afterwards insisting on it: and in this case, the clerk was to be summoned as a principal impeter, and the patron only incidentally, to show what right he could claim in a presentation which he had once lost by judgment of law. If a patron caused a clerk, properly instituted, to be summoned for impeding his presentation, he might answer, that the church was not vacant; which would be tried by the bishop; or he might say, that he claimed nothing in the advowson, nor impeded any one by presenting, but that he himself was already in possession, and therefore that the church was not vacant.

Lest the bishop should put an incumbent into the church, *pendente lite*, before the six months elapsed, there used to go an inhibition *ne incumbaret*, or *ne clericum admittet*, &c., so that the bishop could not afterwards admit any one till the suit depending was determined. If, however, the last presentation was determined in one suit, and another was depending upon the right, the bishop was to admit a clerk presented by him who had the last presentation, notwithstanding the prohibition.<sup>1</sup>

When a person recovered seisin by assize of darrein presentment, by *quare impedit*, or *quare non permittit*, there went a writ to the bishop *ad admittendum clericum*, which usually stated the record and judgment in the action. When these writs were occasioned by either of the two last actions, there was a clause inserted, which was left out in that which issued after an assize; and as this shows a remarkable difference between these actions, it may be worth noticing. In the case of a *quare impedit*, and *quare non permittit*, a clause was inserted in this writ, which directs that the clerk should be admitted *non obstante reclamacione talis*, naming the unsuccessful party. Now, as a *quare impedit* and *quare non permittit* were actions between certain parties, who were to abide the judgment given between them, neither ought to resist the execution thereof, and such a clause was very proper. But in an assize of darrein presentment it was otherwise; for though the suit was between certain parties, yet the assize was not only to inquire of their right, but of that of any other persons whatsoever; the writ directing the jurors to recognise generally *quis advocatus*, *who*, and not whether either of the parties only, made the last presentation; and therefore it would be in vain to say, *non reclamante*, the persons named in the writ, when any other person might resist it if the assize declared for him, though he was not named in the writ.<sup>2</sup> When this assize was taken *in modum juratoe*, the issue in such case

<sup>1</sup> Bract. 247 b., 248.

<sup>2</sup> *Ibid.* 248 b.

not being *quis*, &c., but on a collateral fact, then this clause was inserted.

If the clerk of the patron who lost in the assize instituted any suit against the other clerk in the spiritual court, there went a prohibition to stop it, as we before saw in Henry II.'s reign.<sup>1</sup> Should the bishop neglect to obey the writ *ad admittendum clericum*, there issued another of *quare non admisit*, upon which lay the process of attachment, and upon this inquiry might be made into the reasons and propriety of the delay.<sup>2</sup> Thus far of these writs of possession concerning presentations. The writ of right of advowson belongs to another place.

And now we have gone through the remedies the law provided, where a man was disturbed by violence or otherwise from his *own proper seisin*. We are next to speak of the seisin of *another*, the principal of which is, that of an ancestor: in such case, the method in which the next heir might recover was by *assisa mortis antecessoris*.

The writ of *mortis antecessoris* preserved now the form it had received in Glanville's time,<sup>3</sup> with the single variation *Assisa mortis antecessoris* of the return, and limitation. The limitation, according to the alteration made by the Stat. Merton, was, *si obiit post ultimum reditum regis Johannis patris nostri de Hibernia in Angliam*; the return was, *coram justitiariis nostris ad primam assisam, cum in partes illas venerint*: though to these variations it may be added, that whereas in Glanville's time it seems to have been only on a father's dying seised, it was now extended further, to the death of a mother, brother, sister, uncle, and aunt.<sup>4</sup> These were the degrees within which an assize was limited; for a proper writ of mortauncestor never was allowed so high as the grandfather (though there was a writ *de morte avi*, and *avie*, which Bracton calls partly a mortauncestor, and partly a writ *de consanguinitate*), nor in descent so low as the grandson; no assize being allowed of the death of one or of the other, though a grandson might have an assize of the death of his uncle or aunt, as before said. Again, this assize would not lie *inter conjunctas personas*, as brothers and sisters, grandsons and granddaughters.<sup>5</sup> We shall afterwards see how the writ *de consanguinitate* was framed to supply some of these defects.

In an assize of mortauncestor the process was a re-summons, in the same manner as was before mentioned in the assize of darrein presentment; and if at length the parties appeared, but the jurors did not, then there was an award, that *ponatur assisa in respectum pro defectu juratorum*; and they were called together again by a *habeas corpora juratorum*, just as was stated in that assize.<sup>6</sup> It appears in Glanville's time that the tenant was not to be waited for after the first summons.

<sup>1</sup> Bract. 250 b. *Vide ante*, 141.

<sup>4</sup> Bract. 254-261 b.

<sup>2</sup> *Ibid.* 251 b.

<sup>5</sup> *Ibid.*

<sup>3</sup> *Vide ante*, 178.

<sup>6</sup> *Ibid.* 255, 255 b., 256.

When both the demandant and tenant appeared in court, the Vouching a tenant might call a warrantor—a privilege which Glan-warrantor. ville does not mention as allowed in this writ; upon which there issued a summons *ad warrantizandum*. If at the day the demandant and tenant appeared, but the warrantor made default, then the assize was taken by the default of the warrantor; nor was any process of distress by caption of his land, or otherwise, allowed against the warrantor, till the assize was taken, and it was known whether the tenant lost or retained his land, and so whether he needed any recompense from his warrantor; and even should the assize not be taken on that day for want of jurors, or for any other cause, and the warrantor appeared before it was, yet, notwithstanding, he would not be heard till the assize had first been taken. If the tenant lost by the assize, they proceeded against the warrantor, and distrained by the writ of *CAPE in manum domini regis, &c.*, *deterre ipsius A. ad valentiam terre, &c.*, *quia B. recuperavit versus, &c.* If the warrantor appeared in obedience to this compulsory process, he either entered into the warranty, or pleaded he was not bound to give a recompense in value; for this obligation of his warranty was the only point which he could now deny, it being in vain to say anything about the other of defending him in his seisin: that being lost by the assize. If he could not defend the recompense in value, he was immediately to make the usual satisfaction to the tenant.

If the warrantor appeared at the first day, he either entered into the warranty, or showed why he did not. If he entered into the warranty, he might make all the answers and exceptions the tenant might; and he became, in fact, the very tenant. He might call others to warrant him; and if the last warrantor could not deny his warranty, or the assize was taken by his default, he was to give a recompense in value to his feoffee, and that feoffee to his, and so on, to the tenant in the action.

When the warrantor denied that he was bound to warrant, no other penalty, as we said before, was inflicted on the tenant, but that the assize was taken by default; and this was the great difference between the situation of a tenant under these circumstances in an assize of mortdauncestor, and in a writ of right: and with reason; for in the assize, the warrantor was only to defend against the assize, by saying something to show that it ought to remain; and if he could not say anything to that effect, the assize proceeded of course, and the question was only upon the possession: whereas, in a suit *de proprietate*, the warrantor was called to answer to the demand, and defend the very right; and he was bound to show that the demandant had no right; and if he could not do this, there was a judgment, that the land should be lost for want of a defence.<sup>1</sup>

When the demandant stated his *intentio*, he was then to estab-

<sup>1</sup> Bract. 257 b. to 261.

lish and prove, by the assize *in modum assise*, all the articles of the writ, namely, *quod tuis antecessor*, of whose seisin he claimed, *fuit seisitus in dominico suo, ut de feodo, de quo obiit*, and *post terminum*, &c., which was the limitation in these writs; and if he failed in one of these articles, the assize was as much lost as if he had failed in all.<sup>1</sup> To all or some of these the tenant, if he could not call a warrantor, as before stated, might answer and make his exceptions, showing why the assize should not proceed; and for proof of what he said, was (as in the other assizes) to put himself upon the assize *in modum assise*, or *in modum jurato*, according to the nature of the allegation: for this assize, as well as that of novel disseisin, was sometimes turned into a jury, to try the truth of such collateral facts as might be alleged against the assize proceeding. The sort of facts which would occasion this change, and the manner in which it was conducted, it would now be unnecessary to enumerate particularly, after what has been said on the assize of novel disseisin. The writ of *seisinam habere facias* was various, according to the circumstances of the proceeding in court: whether the recovery was by the assize, by judgment, by confession, it was always so mentioned: *Scias, quod A., &c., recuperavit, &c., per assisam, &c.*<sup>2</sup>

We shall therefore conclude what we have to say upon the writ of *mortis antecessoris*, by showing between what *persons* it would hold, and adding a few remarks upon the *writ* where this *instances* where it was not allowed. The reason of confining this writ within certain degrees was an anxiety, lest by extending it further, questions *de proprietate* might be sometimes determined by an assize, which was a proceeding only designed for disputes about the possession. This writ would not lie between *conjunctas personas*, as co-heirs, whether they were parceners, that is, capable of taking an inheritance descending from a common ancestor, or not capable; for if they were co-heirs capable of taking, that is, if the inheritance was partible, as among daughters, or, by particular custom, among the sons, recourse was to be had to the writ *de proparte*: and if, in such case, an assize was brought, it would be lost by the exception of the mere right, as each of them was the *hæres propinquior* to his own share, compared with those in a remoter degree. And again, where they were co-heirs (who were by law considered *quoad seisinam* as *justi et propinqui*), though not parceners, or capable to take, as above supposed, but one of them, to whom the *jus merum* descended, was preferred to the others; yet, even in this case, the assize would not lie, as it only would determine the possession and seisin, respecting which they were considered all equally *justi et propinqui*; but recourse was to be had to the writ of right, which determined both the seisin and the mere right.<sup>3</sup>

As this writ would not lie between co-heirs that were legitimate,

<sup>1</sup> Bract. 261 b.

<sup>2</sup> *Ibid.* 256.

<sup>3</sup> *Seisinam et merum jus.*

capable or not capable, so neither would it between legitimate and natural children: for if it was objected to a natural brother that he was a bastard, or a villein, though he should prove himself legitimate and free, he would not thereby prove himself *hæres propinquior*, which must be done before the right could be decided; and therefore, as that could not be in this assize, they must resort to the writ of right.<sup>1</sup>

It had been said by Glanville, that this assize would not lie in burgage tenure,<sup>2</sup> on account of a particular law, the effect of which law we may guess at, when we learn from Bracton that the reason of this was because many boroughs had a particular custom, which enabled the burgesses to make wills of land; and where that prevailed, it was to no purpose to inquire by this writ, whether the ancestor died seised. He says that the freemen of London<sup>3</sup> and burgesses of Oxford could make wills of their land, as of a chattel, whether they had such land by purchase or descent. In some places, this custom was confined to land purchased.<sup>4</sup>

We have seen that the assize of mortuancestors was limited within a writ *de consanguinitate*. certain degrees, and lay only against certain persons, on the death of certain persons, beyond which recourse was to be had to a writ of right. To prevent this, in questions of seisin which could be proved *de proprio visu et auditu*, there had lately been contrived, in aid of this assize, the writ *de consanguinitate*, which was to determine questions of possession in such degrees and persons to which the assize did not extend within the time of limitation prescribed to the assize. This writ lay only of such things as the deceased died seised of *in dominico suo, ut de feodo*, and not those he died seised of *ut de mero jure*; it being designed to go only upon the possession, to avoid the hazard of the duel, and of the great assize. As this writ came in the place of the assize, and had for its object the seisin of the ancestor, there was every reason why it should pursue the nature of its original, as nearly as possible. It therefore observed the time of limitation in the old writ, and was confined to the same persons to which that was. Thus, though this writ exceeded the degrees of the assize, as it extended to the grandfather, great-grandfather, and higher in the ascending line; and in the descending, to the grandson, great-grandson, and lower; it, nevertheless, did not lie between such persons as the assize did not, as between co-heirs and the like; according to the rule, *inter quascunque personas locum habet assisa infra suos limites, inter easdem locum habet consanguinitas*; and *vice versâ*.<sup>5</sup> And if the time exceeded the limitation in a writ of *mortis antecessoris*, the writ of consanguinity would not hold, as the demandant could not by possibility, at such a length of time, prove the seisin *de visu et auditu proprio*, but only *alieno*, that is, of the father of the witness, who saw it, and enjoined his son to witness

<sup>1</sup> Bract. 278 b.

<sup>4</sup> Bract. 272.

<sup>2</sup> *Vide ante*, 182.

<sup>5</sup> *Ibid.* 267.

<sup>3</sup> *Barrows Londini.*

it thereafter, which sort of testimony could only be received in a writ of right.<sup>1</sup>

This was the origin and the nature of the writ *de consanguinitate*, the form of which was as follows:—*Præcipe A. quòd justè et sine dilatione reddat B. terram, &c., cum pertinentiis in villâ, &c., de quâ C. consanguineus* (or it might be expressed specially, as *avus*, or *nepos*) *ipsius B. cujus hæres ipse est, fuit seiscitus in dominico suo, ut de fiedo, die quo obiit, ut dicit. Et nisi fecerit, & B. fecerit te securum, &c., tunc, &c. &c.* After the essoins, and both parties appeared in court, the demandant was to propound his *intentio* in this way: *B. petit versus A. tantam terram cum pertinentiis in tali villâ, ut jus suum, et unde talis consanguineus suus, cujus hæres ipse est, fuit seiscitus in dominico suo, ut de fiedo, die quo obiit; et de ipso tali descendit jus prædictæ terre cuidam tali filio et heredi:* and thus he was to deduce the descent, as in a writ of right, down to himself; and then add, *et quòd tale sit jus suum, et quòd talis consanguineus ita fuit seiscitus, offert, &c.*, he made an offer to prove: to which the tenant answered in this way: *Et A. venit, et defendit jus suum, &c., et dicit, quòd non debet ad hoc breve respondere, quod, &c.*<sup>2</sup> which scrap of pleading may be noticed, as well for illustrating the action we are now upon, as to give the first instance that occurs of the formal parts of a record; many such will present themselves before we have done with this reign. It must be remembered that Bracton says this action was an assize, and might, like others, be occasionally turned into a jury. All those exceptions might be made to it which lay in the assize of mortmaince.

It is stated as a question by Bracton, whether this writ could, by means of the *narratio*, or *counting* upon it, be turned into a writ of right, as a writ of entry might; as for instance, if the demandant in a writ *de consanguinitate*, in counting his descent, *et unde talis consanguineus suus obiit seiscitus in dominico suo, ut de fiedo*, should then add, *et de jure*; this, Bracton says, would be going from the possession to the *proprietas*: for in saying, *talis obiit seiscitus in dominico suo, ut de fiedo*, the *jus possessionis* only was brought in question; and when he adds, *de jure*, he brings likewise in judgment the *jus proprietatis*, which made the *jus duplicatum*, or *droit droit*.<sup>3</sup> But as the writ *de consanguinitate* was, in its nature, only a possessory remedy, the demandant, by counting of the mere right, would go beyond the design of it; and therefore the writ would be destroyed, and the party have no remedy left but the writ of right. Again, by the same reason, a writ of right could not, by the way of counting, be turned into a writ *de consanguinitate*, as a person who had once commenced a suit upon the right, with effect, could never go back to an action upon the possession only. But a writ of entry, as it was *in jure proprietatis*, might sometimes become a writ of right, on account

<sup>1</sup> Bract. 281.<sup>2</sup> *Ibid.*<sup>3</sup> *Vide ante, 320.*

of the entry being too ancient to be proved *proprio visu et auditu* : and again, a writ of right might become a writ of entry, when the entry could be proved *proprio visu et auditu*. But of this we shall have occasion to say more hereafter.<sup>1</sup>

An assize of mortauncestor did not lie for a right of common, of the seisin of an ancestor ; in lieu of it, therefore, as *Quòd permittat.* writ of *quòd permittat* had been formed : *Præcipe, &c., quòd, &c., PERMITTAT talem habere communiam pasturæ, &c., de quâ talis pater, or avunculus, or consanguineus, cujus hæres ipse est, fuit seisitus de feodo tanquam pertinente, &c.* And in like manner for a successor : *Præcipe, &c., quòd, &c., permittat A. rectorem talis ecclesiæ, &c.* These two writs were possessory, as well as the former ; and the mere right could not be discussed in them.<sup>2</sup> They were likewise always determined by a jury, and not in the way of an assize.

There was a writ which partook of the nature of an assize of *mortis antecessoris* and of novel disseisin, to summon a person *ostendendum quo warranto se teneat in tantâ terrâ, &c., quia A. pater ipsius B. recuperavit versus eundem C., &c., et de quâ fuit seisitus ut de feodo, die quo obiit, &c.* The like in case of a common.<sup>3</sup>

It was not the practice to allow damages to be recovered in an assize of mortauncestor, which Bracton laments as an encouragement to chief lords to commit waste and destruction on lands which they seized at the juncture of a tenant's death. We have before seen that a chief lord was more commonly an object of this assize than persons of any other description.<sup>4</sup>

The next and last remaining assize was the *assisa utrùm*, to try whether a fee was lay or ecclesiastic.<sup>5</sup> But before we enter upon this, let us turn back for a while, and review these assizes, in the first mention of them by Glanville, and as they were now treated by Bracton. This proceeding was in Glanville's time called *recognitio* ; and, in speaking of the remedies upon seisin, he enumerates the recognitions then in use in the following way :—There were, says he, the recognition *de morte antecessoris* ; that, *de ultimâ presentatione* ; that, *utrùm aliquod tenementum sit feodum ecclesiasticum vel laicum* ; that, *utrùm aliquis fuerit seisitus de aliquo libero tenemento die quâ obiit, ut de feodo, vel ut de vadio* ; that, *utrùm aliquis sit infra ætatem vel plenam habuerit ætatem* ; that, *utrùm aliquis obierit seisitus de aliquo libero tenemento, ut de feodo, vel ut de wardâ* ; that, *utrùm aliquis presentaverit ultimam personam ad ecclesiam, occasione feodi vel wardæ*. These he speaks of by name ; and then adds, "and if any similar questions (as many might) arise in court during the presence of the parties, it was often awarded, as well by consent of parties as by the advice of the court, to decide the controversy by a recognition : " and then he mentions the recognition *de novâ disseisinâ*.<sup>6</sup>

<sup>1</sup> Bract. 283 b., 284.

<sup>2</sup> *Ibid.* 186.

<sup>3</sup> *Ibid.* 284, 284 b.

<sup>4</sup> Glanv. lib. 13, c. 2.

<sup>5</sup> *Ibid.* 285.

<sup>6</sup> *Ibid.* ante, 148.

<sup>7</sup> *Vide ante*, 178.



Thus did Glanville consider, not only all those above specified, but all possible recognitions had by consent of parties upon the same footing, of the same nature, and attended with the same legal consequences: as they were all *recognitions*, so were they all *assizes*; those terms being, at that time, convertible. We have before observed, that a recognition taken by consent of parties was afterwards called a *jurata*, and that a distinction arose between an assize and a jury (*a*). In consequence of this, many of the issues which in Glanville's time were tried by an *assize*, were now tried by a *jury*; and of all those assizes enumerated by him, there remained at the time of which we are writing only that of *novel disseisin*, *ultime presentationis*, *mortis antecessoris*, and this *assisa utrum*. The first three of these survived, no doubt, because they were remedies by which property might be recovered, being attended with compulsory writs of execution and the like; and therefore, as they were continued for the same purposes for which they were framed, they retained their original appellation, with their original use; while the others, being to try issues which were of little importance, except when connected with some principal question of right, and which now might be tried by a jury, or by the assize in the cause turned into a jury, went out of practice as original assizes, if indeed they ever have been such. And it is to be wondered how the *assisa utrum* escaped the same fate, having nothing in it like an original commencement of a suit, but seeming to be rather calculated for the trial of an incidental question, not of importance except as it was involved in some other.

In later times, those who wanted to account for these actions being denominated assizes, have usually said that they were called so, because the jurors were summoned in the first instance by the original writ, which did not happen in any other action. How far this might be, strictly speaking, a reason for the appellation, after what has here been said of the history of assizes and juries, the reader may form some judgment.

To return to the *assisa utrum*. This assize is said by Bracton to have *multum possessionis et juris*, which is more than could be said of any other, as it determined both the possession and the right; for there could be no question raised about the right after this assize, though the person who had *more right might*, notwithstanding, contest his claim upon the *merum jus*. In this assize,

(*a*) The author appears to have been misled by different words which meant the same thing in substance, only for different purposes. The recognition seems to be on the main question, but it was to be by twelve jurors, who were to be summoned to say whether the plaintiff was entitled; and as they gave their verdict on their own knowledge, they were said to recognise, and it was called a recognition; but Glanville calls them jurors. Thus, he says, that in a writ of *mort d'ancestor* twelve men are to be chosen to make the recognition, and the proceedings came to an assize; and when the assize is taken, he says, if the *jurors* decide for the demandant, judgment is given for him (lib. xiii. c. 7). So elsewhere: "If no exception be taken in court, on account of which the *assize* ought to cease, the *recognition* shall proceed, and the seisin shall, on the oaths of the *twelve jurors*, and according to their verdict, be adjudged" (c. 11). Thus it is clear that assize was simply trial by jury.



recognition was to be made, whether the tenement in question was the lay fee of the tenant, or was held *in liberâ elemosynâ*, belonging to some church. This assize, says Bracton, might be brought either by a layman or clerk; and so the practice had been established in the time of the famous justice *Pateshall*, though he afterwards himself altered his opinion, and held it would only lie in the person of a rector. But in the time of Bracton, they returned to the practice first established by *Pateshall*, and it was held good both for clergy and lay. This writ belonged only to rectors of parish churches, and not to vicars.

The writ in this assize was much the same as in Glanville's time, only it was returnable before the justices *ad primam assisam*. In this assize, the tenant, whether clerk or lay, might vouch to warranty, as in the assize of *mortis antecessoris*. This assize would not lie of land given to cathedral and conventual churches, though given *in liberam puram, et perpetuam elemosynam*; the reason was, because the gift was not to the church solely, but also to a person, to be held as a barony; as, *Deo et ecclesie tali, et priori, et monachis ibidem Deo servientibus, or episcopo tali, &c.*; and therefore such persons might have all those remedies which laymen might, as writs of novel disseisin, of entry, and of right; and consequently were not to avail themselves of a remedy devised merely for a parson claiming land in right of his church, and who could claim no otherwise: for in cases of parochial churches, gifts were considered not as made to the parson but to the church. This assize, like others, might be turned into a jury; and it may be noted here, that in all assizes, when the assize passed *in modum assise*, the entry on the roll was, *assisa venit recognitura, &c.*; when *in modum jurate*, the entry was conformably *jurata venit recognitura, &c.*

It may be observed that, besides this assize, a parson might have many remedies to which laymen were entitled. He might have an assize of novel disseisin, and a writ of entry; an assize of mortuance, from the nature of the parson's estate, could not be brought by him. If a writ of right was brought against a parson, he might, like another person, vouch to warranty, and then the suit would go on between the demandant and the warrantor to the duel, or the great assize. But if he had no warrantor, and had some one who could testify *de proprio visu et auditu*, then, says Bracton, he might put himself upon a jury to try, *utrum terra petita sit libera elemosyna, &c., an laicum feodum, &c.*, as if a layman had originally brought the *assisa utrum*; which is a very happy and pointed instance of the remark we made before concerning the issues, formerly triable by assizes, being devolved on juries. If he chose to defend himself by the duel or great assize for want of some witness *de proprio visu et auditu*, he might do it from the necessity of the case, provided he had licence from the ordinary and the concurrence of his patron. If land fell to his church by escheat, there was a writ for the rector to recover it:—*Præcipe quòd, &c., reddat tali rectori,*

*&c., quam clamat esse jus ecclesie, et quare, &c., reverti debet, tanquam eschata.*

As this assize determined the right as well as the seisin, it was made a question by some, whether a conviction would lie against the jurors; and Bracton was clear, from some determinations in this reign, that it would, if the assize was taken *in modum assise*, and if the writ of conviction was prayed before a long interval had passed from the taking of the assize. A conviction had been denied where sixteen years had elapsed.<sup>1</sup>

As we have gone through all the assizes now in use, it follows that something should be said on the *conviction* or *Of conviction.* *attaint*, as it was called in latter times, for perjury, to which the recognitors were liable if they swore falsely. This is treated very shortly by Glanville, who only mentions the punishment; and from the passage where he speaks of it, one might be led to think it belonged only to the great assize.<sup>2</sup> We shall find that, on the contrary, though in Glanville's time it might lie in the great assize as well as others, yet now it lay in all others, but not in the great assize.

When, therefore, the jurors in any of the foregoing assizes had sworn falsely, and so committed perjury, they might be convicted of that perjury by the person who had lost by the assize (*a*). And that might be effected several ways: either by the oaths of twenty-four other jurors, or out of their own mouths by the examination of the judge, without recourse to the jury of twenty-four, or by their own free confession, in which they acknowledge their offence,

(*a*) The *Mirror* says, after mentioning the county court, "The other inferior courts are the courts of every lord of the fee, and in which they have cognizance of debts, covenants, and such small things which pass not forty shillings in value, and also of trespasses and *forfeitures of the fees* between the lord's plaintiffs and the tenant's defendants, *et c. contra*" (c. 1, s. 15). And elsewhere it is said, "If rent-suit or other service be in arrear to the lord of the fee, the tenant is not distrainable by his moveable goods; but it behoveth to summon the tenants, to save their deposits; and if they appeared at the summons, then by the award of the suitors their lands are to be seized into the lord's hands till they justify themselves. And if the lord have not a proper court nor suitors, or hath not power to do justice to his tenants, then the same may be done in the county or hundred or in the king's court, by a writ of customs and services and other remedial writs. And if the tenant hath not anything to acquit himself, the lord may seize his land" (c. 2, s. 10). "If any of the parties say that the jurors have made a false oath, or any jury, an action of the attaint lieth, which is to be tried by twenty-four jurors, so that every false witness be attainted by two jurors" (*Mirror*, c. 3, s. 33). Here will be observed the *principle* on which the attaint rested, viz., that the jurors were *witnesses* of their own knowledge, so that if their verdict was untrue, it must have been wilfully so; for if they did not know, they had no business on their oaths to say one way or the other. If they say on their oaths what they did *not know* to be true, was in effect the same as if they said what they knew *not* to be true. It is said in the *Mirror* as to the original trial, "The usage is that the affirmative party, in aid of the court, cause the nearest credible neighbour to appear as witness, so that there be twelve men at least of the jury (of ancient time ordained to be of the assize), of which if two men are by false verdict of them and of the other jurors, or if by good examination of all the jurors to one assent it sufficeth" (*Ibid.*)

<sup>1</sup> Bract. from 285 b. to 283.

<sup>2</sup> *Vide ante*, 107.

and put themselves on the king's mercy; and in these different cases, the penalty was accordingly different.

If they were to be convicted by another jury, it was first to be seen how many jurors were in the assize (for they were not always the same number); each juror was to have at least two to convict him; and the jurors on the conviction were to be at least of as good condition, if not better, than those on the assize.

When it was in agitation to proceed to conviction in this manner it was first to be considered who was in fault, whether the judge or the jurors; for which purpose the record was in the first place to be inspected, for if the judge should not have diligently made that examination, which it was his duty to do, he himself might have negligently left occasion of perjury to the jurors, and thus both would be in fault; perhaps it might lie with one of them only. By the record it would also appear whether the assize was taken *in modum assise* or *in modum jurate*. If in the former way, the jurors were to try whether the verdict was *true* or *false*; if it was true, then it remained in force; if false, the jurors were to be punished for their false swearing. According to Bracton, a distinction was made between a verdict that was *fulsum*, and one which was called *fatuum*: as for instance, if they gave their verdict generally, and it was not true, then it was what they properly called *fulsum*; but if they gave a reason together with their verdict, and it was not true, this was called *verdictum fatuum*, being only a wrong conclusion of the jurors, and so rather a false reasoning than a false swearing. The judge might sometimes go contrary to the verdict of the jurors when they spoke the truth and gave their reason for so doing. If, in such case, he knowingly deviated therefrom, the fault lay with him.

If, upon view of the record, it appeared that the jurors, having declared themselves obscurely, had not been properly and diligently examined by him, or had answered his interrogatories not fully or doubtfully, or seemed to have been misled by some mistake, or to have spoken the truth only in part, in such cases, the remedy was by *certificate* and not by conviction; the certificate being a proceeding whose object was to render certain and true that which was before dubious, erroneous, and uncertain (*a*): of this we shall say more hereafter.

In order to the conviction, as we before said, it must first be seen, whether the assize was taken in *modum assise* or *in modum jurate*. When the complainant or demandant propounded his *intentio* and

(*a*) Here again it is observable how closely the *Mirror* follows Bracton, from whom all this is taken. "If jurors have obscurely, or doubtfully, or not sufficiently given their verdict in any action or exception, or any of the parties be grieved thereby, there is a remedy by a commission of certificate, to make the jurors come again; and the parties who are the plaintiffs ought to have under the seat of the judge, the proceedings of the plea before it, and to show the defect and the offence of the juror; in which case, if the judges by examination find it doubtful, the doubt is to be reduced to certainty, and the obscurity to clearness, and the error to truth, and so the first judgment is to be redressed" (c. iv. s. 27).

maintained all the articles of the writ, and the tenant excepted to both, by denying them in part or in the whole, the complainant was then to prove them by the assize: and as this was *in modum assise*, a conviction would lie. But where the exception was of such a kind that, admitting both the matter of the writ and the *intentio*, yet it destroyed the action as a covenant or the like, then the assize was taken, as has been often before mentioned, *in modum juracie*, and the conviction would not lie. Yet, if the assize was taken in the absence of the tenant, and they found such matter as would have been good subject of exception to the action, as a covenant, for instance, or the like; then the assize being taken *in modum assise*, a conviction would lie.<sup>1</sup>

A conviction, as we before said, lay in all assizes except the great assize; and the reason given by Bracton why it did not lie there is, because when the tenant had the choice between the duel and the assize, and he had voluntarily betaken himself to the latter, he should not be allowed to reject their determination any more than when a person had chosen to put himself on a jury;<sup>2</sup> and therefore a conviction which was with a view to overthrow and question such determination, was denied in both cases. However, there was an exception in favour of the king, for when a jury had found anything against the king, Bracton says, that there might, in some cases, be a conviction. There was no conviction for damages, but the remedy in case of excessive damages was by *certificate*. The same persons who brought an assize, or against whom it was brought, might have a conviction; and it was, in general, to be heard before the judge who tried the assize, he being best able to judge of the truth thereof.<sup>3</sup> The authority to take an assize was thought *eo nomine* to carry with it that of taking convictions and certificates, without which an assize might sometimes not be completely taken; therefore it was, that a conviction was to be *statim et recenter* after the caption of the assize; and it could not be had at a distance of time but by the special command of the king.<sup>4</sup>

The writ of conviction was to the following effect:—*Si A. fecerit, &c., tunc summoneas, &c., 24 legales milites de vicineto de villâ, &c., quòd sint coram justitiariis nostris ad primam assisam, &c., recognoscere si talis, &c., disseisivit, &c., as in the writ of assize; unde A. queritur, quòd juratores assise novæ disseisinae quæ inde summonita fuit et capta inter eos coram justitiariis nostris ultimo itinerantibus in comitatu, &c., falsum fecerunt sacramentum. Et interim diligenter inquiras, qui fuerunt juratores illius assise, et eos habeas ad præf. assisam coram præf., &c. Et summoneas B. quòd sit, &c., auditurus illam recognitionem, &c.*<sup>5</sup> If nothing could be objected against this inquiry when the jury appeared, they were sworn, not as an assize but as other juries:—"Hear this, ye justices,

<sup>1</sup> Bract. 288 b. 289, 290.<sup>4</sup> *Ibid.* 291.<sup>2</sup> *Vide ante*, 335.<sup>5</sup> *Ibid.*<sup>3</sup> Bract. 200 b.

that I will speak of that which you require of me, on the part of our lord the king," &c. Then the judge proceeded to charge the jurors as in other cases. The entry upon the roll was thus:—*Jurata viginti quatuor ad convincendum 12 venit recognitura, si A. injustè et sine judicio, &c.*, according to the form of the writ: and then the *narratio* followed:—*Et unde talis queritur, quòd juratores talis assise captæ coram justitiariis, &c., falsum inde fecerunt sacramentum, eò quòd dixerunt quòd prædictus talis disseisivit talem injustè, &c.*, and so on through the *narratio* and *exception*, if any.<sup>1</sup> Upon this writ of conviction it may be remarked, as a reason why it should not lie, when the assize was taken *in modum jurata*, that the form of the original writ in the assize was so inserted as to confine the inquiry to the articles of that writ;<sup>2</sup> whereas the point tried by the assize *in modum jurata* was, generally, something collateral to the writ which arose upon the pleading.

As these twenty-four could not be convicted if they spoke falsely, and as the consequences of a conviction would be very penal to the twelve, great care was taken to examine the jurors diligently as to all the circumstances upon which they meant to proceed. If there was a difference of opinion amongst them, they might be afforded like the assize. If they were still doubtful, or declared plainly that they knew nothing of the matter, things were left to remain as they were. If they confirmed what the twelve had done, the judgment was entered thus:—*Consideratum est, quòd 12 juratores benè juraverunt, et quòd tenens remaneat in seisinâ, et querens custodiatur*, to be redeemed by some heavy pecuniary penalty. If they found against them, the entry was, *Consideratum est, quòd prædicti 12 juratores malè juraverint, et quòd querens recuperet seisinam suam, et elle tenens in misericordiâ, et juratores* (if they were present) *custodiantur*, if not *capiantur*. If the twelve had not been unanimous in their verdict, the twenty-four might convict those who were on the wrong side, and acquit the others.<sup>3</sup> After the verdict of the twenty-four, there issued writs of execution either to confirm the former seisin or to alter it.<sup>4</sup>

The punishment of the convicted jurors, though in substance the same, is more particularly stated by Bracton than by Glanville.<sup>5</sup> They were to be thrown into prison; their lands and goods were to be taken into the king's hands, till they were ransomed at the king's pleasure; they were to be branded with perpetual infamy; to lose the *legem terræ*, so as never more to be received as jurors (being, as they then called it, no longer *othesworth*) nor witnesses. A difference was made between the offence of jurors; for those who swore *salvo visu*, not having made it; those who were added to the assize at the time of taking it, who could not possibly have made it; those who, soon after the taking of the assize, had signified a wish to amend what they had done, and put themselves on the

<sup>1</sup> Bract. 292.<sup>2</sup> *Ibid.* 292 b., 293.<sup>3</sup> *Ibid.* 291 b.<sup>4</sup> *Vide ante*, 131.<sup>5</sup> *Ibid.* 292 b.

king's mercy;<sup>1</sup> all such were not to be branded with infamy, though they were to suffer the other part of the judgment.

This was the manner of proceeding if there was no exception offered to the conviction. The exceptions that might be offered were many. One was, if the person who recovered in the assize had not had seisin according to the verdict; another was, if the person serving the conviction had made a disseisin of the identical land in question. It seems that a conviction was often prosecuted not out of any hopes of convicting the twelve and recovering seisin, but merely to extinguish, or at least defer payment of, the *miseri-cordia* due in the assize.<sup>2</sup>

Having said this much of *convictions*, it remains to show what was the nature of a *certificate*, which was the other Of certificates. method of re-considering the decision of the jurors in assize, and which was sometimes an introduction to the former. The writ to summon jurors *ad certificandum* was of the following import:—*Præcipimus tibi, quòd habeas coram justitiariis, &c., corpora A. B. C., &c., recognitorum novæ disseisinæ summonite, et capite coram, &c., ad CERTIFICANDUM præfatos justitios nostros, &c., de sacramento quod inde fecerunt. Et interim prædictum tenementum in manum nostram cape, &c. Præcipimus etiam quòd habeas, &c., corpus talis ad audiendum inde considerationem curiæ, &c.* A certificate was sometimes heard in order the better to understand the record in assize, and after that it might be thought proper to resort to a conviction. If the twenty-four were doubtful or obscure in delivering their verdict, there might also, after all, be a certificate of their record.<sup>3</sup> A conviction might be brought by the heir, if the ancestor died after the caption of the assize.<sup>4</sup>

We have before taken notice of the lenity shown to such jurors as wished to amend the false verdict they had once given. This had the effect of taking off some of the consequence of their perjury. To this it may be added, that the jurors, of right, might change their verdict before judgment was given; but afterwards, the only remedy was to proceed against them in a conviction.<sup>5</sup>

As we have now done with assizes, and are proceeding to such actions as were triable by jury and otherwise, it may Of different trials. be proper, before we enter upon this part of our subject, to say a few words on the different trials now in use: which, though apparently very similar, were so essentially distinguished as to make it necessary to attend to each of them with accuracy.

It must be observed that there were *assizes* of which enough has already been said, *juries*; *inquisitions*, or *inquests*; and *purgations*; as when a crime was imputed to any one, a purgation amounted to a proof of his innocence. Besides these, says Bracton, there was a defence or denial opposed to a presumption raised, which depended neither on a jury, nor an inquisition, nor a purgation, but it was

<sup>1</sup> Bract. 292 b.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* 296.

<sup>5</sup> *Ibid.* 293 b, 294.

when a person averred something, *et inde producit sectam*; upon which there followed a defence *contra sectam* or a quasi-proof opposed to the presumption raised by the *secta*. Such defence against a *secta* was called a defence *per legem*, and consisted sometimes of a greater number of persons and sometimes of less in different cases. We have before seen the regulation which had been made by *Magna Charta* upon this head.<sup>1</sup> What was the nature of this *secta* and of this defence or denial, with the instances in which they were both recurred to, will be seen more particularly in the sequel.<sup>2</sup> For the present, let it suffice to say, that in all cases of obligations, contracts, and stipulations, arising from the voluntary consent and engagements of men, as in covenants, promises, gifts, sales, and the like, where a *secta* was produced, which, upon examination, induced a presumption only, he against whom the complaint was made, might defend himself *per legem*; that is, he might produce double the number of persons which had been in the *secta* to swear for him, for when they exceeded the *secta* in number, they induced a stronger presumption, and the stronger presumption always overbalanced the less. But if the complainant had a proof (for it must be observed, that the *secta* was only a presumption, not a proof), as instruments and sealed charters, there could be no defence *per legem* opposed to such proofs. If, therefore, the instrument was denied, the credit of it was to be proved *per patriam, et per testes*; it being a common issue for a person to put himself *super patriam, et testes in cartâ nominatos*.<sup>3</sup> Again, a person was not allowed this defence *per legem* in cases of evident and notorious trespass.

We shall now begin to speak of such actions as were triable in Dower *unde nihil*. one or other of these ways. The action of dower *unde nihil habet* and the writ *de recto* of dower, were the two remedies still in use to recover dower, and seem to be considered by Bracton exactly in the same light in which they are placed by Glanville. The method of conducting them is more minutely described by Bracton, who also makes observations concerning them, which are well worthy of notice.

The writ *unde nihil* was said to be brought in the king's court originally, and there only, because, should a question arise, whether the demandant was lawfully married, no one could write to the bishop to try the marriage but the king or his justices. The writ *unde nihil* was at this time made returnable, sometimes *coram justitiariis nostris apud Westmonasterium*; sometimes *coram justitiariis nostris ad primam assisam, cum in partes illas venerint*.<sup>4</sup> If the party summoned did not come at the appointed day, nor essoin himself, the land was taken into the king's hands, as in defaults in a writ of right; and if he essoined himself at the first day, and another being appointed, he made default, then also his land was taken, so that, in both cases, whether the default was before appearance or

<sup>1</sup> *Vide ante*; 248.<sup>2</sup> Bract. 290 b.<sup>3</sup> *Ibid.* 315 b.<sup>4</sup> *Ibid.* 296 b.

after, the woman recovered her dower by default, either by the *magnum cape* or *parvum cape*.<sup>1</sup>

When the parties appeared in court, the widow was to propound her *intentio*, in person or by attorney, to this effect:—*Hoc vobis ostendit B. quæ fuit uxor C., &c.*, reciting her title to dower, in pursuance of the words of the writ, concluding it thus:—*Et si hoc cognoscere voluerit, hoc gratum erit ei; et si non, habet sufficientem districtionem*; or, what was the same, and indeed the more common form, *et inde producit sectam sufficientem*. When the demandant had thus exhibited her *intentio*, the tenant might demand a view, by saying, *Peto visum*; and after the essoins and delays attending that, he might vouch to warranty, or answer in person, as he pleased.<sup>2</sup>

If the tenant had no exception to the writ, then he might, in the next place, call upon the demandant to produce her warrantor, as was the practice in Glanville's time; it being a rule, that no one should answer a woman concerning her dower, unless she brought her warrantor to show what right he had to the other two parts; and again, that no woman should answer without her warrantor. And therefore it should seem, says Bracton, that as the son of a felon could have no right in the two parts, the widow of such felon could not make out her claim to dower in the other third; nor could she come upon the chief lord, who held it as an escheat *pro defectu hæredis*; which was not the case where he took the escheat on account of the last possessor being a bastard, and so not having any heirs, for then he came in, as to the purpose of dower, *loco hæredis*; and the widow could claim her dower against him. The same might be said of an assignee of the fee, who being *in loco hæredis*, dower might be claimed against him.<sup>3</sup>

After this the tenant might vouch *his* warrantor; and if he did so, and the warrantor did not appear to the writ of *sum. ad warrant.* nor essoin himself, so much of his land was taken as was equivalent to the third part, by a *cape*; and if he did appear after this distress (for it was no more), the widow recovered her seisin of that, and he had his remedy against the warrantor, whom he vouched.<sup>4</sup>

If no warrantor was vouched, and the tenant meant to answer to the action himself, he might advance, by way of exception to the action, such matter as would entirely defeat the claim of dower. One great exception to this action was, that the demandant and deceased were not *legitimo matrimonio copulata*, or *ne unque accouplés in loyal matrimonie*, as it was afterwards called. In this case, a writ issued to the bishop, commanding him to try such question, as a matter properly belonging to his cognizance. Upon this, the bishop summoned the tenant to appear, and then proceeded to hear the witnesses produced by the widow and him; and so making an inquisition in a summary way, he reported whether the marriage

<sup>1</sup> *Ibid.* The distinction between the *magnum* and *parvum cape* will be explained when we come to speak more particularly of process.

<sup>2</sup> Bract. 297.

<sup>3</sup> *Ibid.* 297 b.

<sup>4</sup> *Ibid.* 299 b., 300.



was lawful or not. When it appeared to the king or his justices, by the bishop's letters, that the marriage was good, then there issued, at the instance of the demandant, a re-summons to the tenant.<sup>1</sup> If he made default, his land was taken by a *parvum cape*; to which if he made no appearance, seisin of dower was adjudged to the demandant.

If the tenant admitted that the demandant was espoused, but pleaded that she was not endowed; or, that she was espoused and endowed, but not *ad ostium ecclesie*; such issues were to be tried in the king's court, and not in *foro ecclesiastico*; for it would have been as improper to transmit these to the ecclesiastical judge to be tried, as the special issue, whether a person born before marriage was legitimate. In this case, therefore, a writ of inquiry went to the sheriff to make inquisition of the fact *in pleno comitatu*:<sup>2</sup> for though the marriage was, in such case, good, as far as concerned the legitimacy of the issue, it was not so as to give title to dower.<sup>3</sup>

Suppose all the above circumstances were admitted, and the tenant said that the dower was given in a different manner than stated in the *intentio* of the demandant; as that it was not given in any particular land by name, but only the third part generally; how was this to be proved? In the first place, it became the widow to prove her *intentio*, and what she had there averred, *per audientes et videntes*, who were present at the espousals, and who were ready to confirm by oath what she said. If these were examined, and they agreed in what they said, this proof was abided by, unless the tenant had some stronger evidence to prove the contrary. Suppose the widow had no proof, nor sufficient *secta*, nor even an instrument to support what she had declared; then judgment was to be for the tenant, though he had neither proof nor presumption for him, because he was already in possession; yet if the widow had a sufficient *secta*, and the tenant only his own voice, he was not to be heard, though he was ready to put himself *super patriam*, but the widow immediately recovered by force of the *secta*.

Again, if the witnesses (that is, the *secta*) were produced on both sides, and those on one side declared their ignorance of the matter, while the others maintained the point for which they were produced; judgment was given for that side, as the one where the truth of the matter lay. It was indispensably necessary, that the widow should produce a *secta*, or her demand would be totally void, and if the witnesses produced proved nothing, or acknowledged that they were not present at the espousals, or knew nothing of the dower or endowment, then the claim was lost for want of proof, and judgment was for the tenant *quòd quietus recedat*.

If neither side had any proof, nor could raise a presumption by a *secta*, and both, in the words of Bracton, *de veritate ponunt se SUPER PATRIAM, pro defectu sectæ, vel alterius probationis, quam ad manum non habuerint*; then there issued a writ of *venire facias* to

<sup>1</sup> Bract. 302, 303.<sup>2</sup> *Ibid.* 303 b.<sup>3</sup> *Ibid.* 304.

the sheriff in this form: <sup>1</sup> *tam ex ipsis, quàm ex aliis de proximo vicino, &c., venire facias coram justitiariis, &c., duodecim liberos, &c., ad recognoscendum, &c., si predictus A. die quo ipsam B. desponsavit, dotavit eam nominatim de tali manerio, &c., vel si dotari eam de tertiâ parte omnium terrarum, &c., ut idem D. dicit, quia tam predicti B. quàm predictus D. posuerunt se, &c.<sup>2</sup> It may be here observed, that the issue, whether endowed *ad ostium ecclesiæ*, was tried on a writ of inquiry before the sheriff *in pleno comitatu*; but the issue, whether special or general endowment, was to be tried before the justices at Westminster; as was also the issue, whether endowed *ex assensu patris*, or not.<sup>3</sup> Again, the issues, whether the husband was so seised as to be able to endow,<sup>4</sup> and whether the widow had received any part of her dower,<sup>5</sup> were tried on a writ of inquiry before the sheriff. The reason of these distinctions is not easily discovered; and perhaps either of such writs were had at the election of the parties. The election of the parties seems to have directed not only in these cases, but also in the return of original writs, which, we have seen were sometimes *coram justitiariis* at Westminster, and sometimes *ad primam assisam*, without any apparent reason for such a variety. They were sometimes made in the alternative, and were returnable at Westminster, nisi *justitarii prius venerint ad assisam, &c.**

In consequence of the statute of Merton,<sup>6</sup> widows were to recover damages; and therefore, when they were to be put into possession, the writ of seisin had one of the following clauses inserted therein. After *seisinam habere facias*, they added, *et similiter ei sine dilatione habere facias tot marcas que ei in eadem curiâ nostrâ adjudicate sunt pro damnis suis, que habuit pro injustâ detentione, quàm predictus ei fecit de predictâ terrâ, et dote suâ*; or in this way, *et de terris et catallis predicti B. fieri facias tot denarios, et illos sine dilatione haberi facias, &c.*

Thus far of the writ of dower *unde nihil, &c.*, commonly called *the writ of dower*. If a person did not recover by this writ all she was entitled to for dower, recourse was then Writ of right of dower. to be had to the writ of right of dower; which was a writ *close*, as they called it, because directed to the warrantor of the widow where the plea was to be heard; where it remained till that court was proved *de recto defecisse*; when it might be removed into the county court, and so to the superior court, as other writs of right.

The *intentio* upon this writ was different in the two cases, of the widow having never been in seisin of the land in question, and of having been disseised by the tenant. The conclusion in the former case was *et unde idem, &c., fuit seisitus, &c., ita quòd me inde dotare potuit. Et si hoc vellet cognoscere, &c.*, as before in the writ *unde nihil. Et si noluerit, habeo sufficientem sectam*. In the latter the conclusion was, *talis me injustè et sine judicio disseisivit, et quòd*

<sup>1</sup> Bract. 304.<sup>4</sup> *Ibid.* 309.<sup>2</sup> *Ibid.*<sup>3</sup> *Ibid.* 312.<sup>5</sup> *Ibid.* 305 b.<sup>6</sup> Ch. 1. *Vide ante*, 261.

*ita fui inde dotata, et seisita habeo sufficientem disrationationem, videlicet, talem sectam, et talem.* Thus this differed from the common writ of right, which concluded by offering to deraign the matter *per corpus talis hominis.* Indeed, it widely differed from that writ in both the above instances in which it was applied; a writ of right of dower was for the recovery of a life estate; and the latter form of it was grounded upon a disseisin in the very words of the writ of novel disseisin: and accordingly, in this action there was neither the great assize nor the duel, nor, consequently, the *essoins de malo lecti*; all which were only in the proper writ of right.

When the *intentio* was thus stated, and the tenant did not choose to call a warrantor, he might except to the action in various ways, and conclude his exception by *et inde producit sectam*, if he had any; and, if there was occasion, by *ponit se super patriam*; in which last case the truth would be inquired of by the country. When recourse was thus had to the country, in a plea depending in the county-court, by the tenant putting himself on the inquest, and the demandant so likewise, Bracton says, some might doubt whether that court had power to proceed to take the inquest, without some special authority; but he thinks the sheriff had that and every other authority by force of the words in the original writ, *nisi, &c., hoc fecerit, tunc vicecomes hoc faciat, &c.*, and as in other writs of right he might proceed to take the duel, and in writs of *justicies* to try by jury, so he might take the inquest in this writ.<sup>1</sup> The reason of the above doubt does not seem easy to be accounted for.

In Glanville there is no mention of admeasurement of dower, but where the land all lay in one county. It had now become the practice, where the land lay in several counties, for the admeasurement to proceed in the king's court; and for all the lands to be extended and valued, as well the two-thirds as the third claimed in dower, and for such extent and valuation to be transmitted to the justices. Where the land lay only in one county, the old writ was directed to the sheriff; upon which there was the process of *cape*, in case of default; and the complainant stated his *intentio*, with an *inde producit sectam*; to which there were exceptions, and the matter was at length tried as in other actions.<sup>2</sup>

As a woman had not, what they called, the *proprietas*, but only the use and enjoyment of the land for her life, she was  
 Of waste. not to commit waste, destruction, or exile upon the freehold; and therefore, in taking such reasonable estover as was allowed her in the woods, for the purposes of building, firing, and enclosure, she was to be careful not to exceed such liberty: and if she did not listen to the remonstrance of the heir, or person who had right, there might issue a writ of *quòd non permittat* to the sheriff; being a sort of injunction, or prohibition, not to permit the widow *quòd faciat vastam de terris quas tenet in dote, &c., ad exheredationem*

<sup>1</sup> Bract. 313 b.<sup>2</sup> *Ibid.* 314, 315.

*ipsus, &c.* And if she did not obey the injunction communicated to her by the sheriff, she was attached by a writ: *Pone per vadium et salvos plegios, &c., quòd sit coram nobis vel justitiariis nostris, &c., ostensura quare fecit vastum, &c., contra prohibitionem nostram, &c.* And if she did not appear at the day, the regular process of attachment would issue, with a permission, if she pleased, to have one *essoìn de malo veniendi* after the first attachment; after which, and the appearance of both parties, the complainant stated his *intentio*, the same as in other actions. *Talis queritur, ut amicus talis, quòd cùm talis mulier teneat in villâ &c., tantam terram nomine dotis, tale fecit vastum, et talem destructionem, &c., boscum et servos vendidit, gardinum extirpavit, &c., ad exheredationem talis heredis ad valentiam tanti, et inde producit sectam, &c.* This was the nature of the *intentio*. To this the widow might answer as follows: *Et talis mulier venit, et defendit vastum, venditionem, et exilium contra talem, et sectam suam: et quòd nihil inde vendidit, nec aliquid tale fecit ad exheredationem talis heredis, &c.* She might acknowledge, *quòd domus vetustate corruerit, &c.*, and *si de bosco cepit aliquid, non cepit ibi nisi rationabile estoverium, &c.*, and then conclude, *et quòd nihil amplius cepit, nec alio modo, ponit se super patrum*: for she could not defend herself *per legem*, says Bracton, because when an injury was done to any corporeal thing, which was manifest to the view of everybody, a person was not permitted to deny it in that way, lest the oath of his *secta* might go to prove the contrary of that which was evident to everybody's senses; and therefore he recommends, that in this action there should always be a regular view; and then the damage also might be ascertained with some exactness.<sup>1</sup>

If a woman was convicted, by verdict, of making waste and destruction in woods, the penalty to be inflicted on her was, that she should in future be so restrained as not to be permitted to take even her reasonable estover but by the view of the foresters of the heir: and in some cases, the court would appoint a forester; for which purpose a writ had been framed, and is to be seen in Bracton.<sup>2</sup>

Waste might be committed, not only by a tenant in dower, but by a tenant for life, and by a guardian. If a tenant for life exceeded the measure prescribed to a reasonable estover, he went beyond what he was entitled to; and so far encroached upon the *proprietas*; and was, therefore, guilty of waste, unless the waste was too small to be worth an inquisition. Of what magnitude it ought to be, to become an object of judicial inquiry, depended, says Bracton, upon the custom of particular places.<sup>3</sup> A guardian committing waste was to lose the custody of the land,<sup>4</sup> to make amends in damages, and be *in misericordiâ regis*; which was different from the penalty on a tenant in dower. In case of waste by a guardian, they proceeded as before stated of waste committed by a

<sup>1</sup> Bract. 315 b, 316.<sup>2</sup> *Ibid.*<sup>3</sup> *Ibid.* 316 b.<sup>4</sup> *Vide ante*, 236.

tenant in dower ; by a writ of *quòd non permittat* ; and after that by attachment.<sup>1</sup>

Of these terms, *waste*, *destruction*, and *exile*, the two first signified the same thing ; but *exilium* meant something of a more enormous nature ; as spoiling the capital messuage ; prostrating or selling houses ; prostrating and extirpating trees in an orchard, or avenue, or about any house : all these were considered, says Bracton, *ad maximam deformitatem* ; and as they either drove the inhabitants away, or had a tendency so to do, they were called *exilium*.<sup>2</sup>

If the heir aliened the two-thirds of the land, and attorned the service of the dowress ; and if he afterwards, on the death of the tenant in dower, intruded himself, or if any stranger did so, the vendee might have a writ of entry, grounded upon such intrusion.<sup>3</sup>

We shall now treat more fully of writs of entry, which have been so often alluded to in the foregoing pages. As questions of possession were determined by assizes and recognitions, questions *de proprietate* were decided, says Bracton, in writs of entry by *a jury*, upon the testimony and proof of those who could prove the case *de visu suo proprio et auditu*. This was, where any one claimed his own proper seisin, or that of his ancestor, which seisin he had demised to some one for a term of years, or for life, and which, of course, after that term, should revert to him ; in which case, he could not have an assize of novel disseisin to recover it, because he had not suffered a disseisin ; nor an assize of mortmain, because, if the term had been for life, the ancestor could not be said to have died seised in his demesne as of fee, while another had the freehold ; though indeed he might, if the term had only been for years.

And this action lay not only against the person himself who had the term, but against all those who had an entry within the *degrees* and the *time* limited to this action. This action was allowed within the third *degree* of kindred, and within such *time* as could be testified *de proprio visu et auditu*. It held not only in the above case, but where a person had his entry *per alium*, who was seised in right of some other, and so aliened ; as where a canon aliened without assent of the chapter, a wife without assent of her husband, a husband without assent of his wife, and the like ; it held also against those who gained their entry through the medium of a guardian, or bailiff only, who had no right to alien.

The most general form of a writ of entry was that which supposed the person against whom it was brought, to have holden the land *ad terminum qui præterit* : upon which writ there might be a *narratio*, containing such special matter as constituted the merits of the case. The following was the form of this writ : *Præcipe A. quòd justè et sine dilatione reddat B. tantum terræ cum pertinentiis in villa, &c., quod idem B. ei dimisit AD TERMINUM QUI PRÆTERIIT, ut dicit ; et nisi fecerit, et B. fecerit te securum de clamore suo*

<sup>1</sup> Bract. 317.

<sup>2</sup> *Ibid.* 316 b.

<sup>3</sup> *Ibid.* 317 b.

*prosequendo, tunc sum. per bon. sum. pref. A. quòd sit coram justitiariis nostris ad primam assisam, cum in partes illas venerint, ostensurus quare non fecerit, &c.*<sup>1</sup>

The process upon this writ was the same as on a writ of right; except that the tenant who might have the *essoin de malo veniendi*, could not have that *de malo lecti*, unless the writ of entry was turned into a writ of right by the *narratio*, or counting upon it, *propter longissimum ingressum*, on account of such a length of entry as could not be proved *visu proprio et auditu*, but only by that of some one else. If it was reasonable that when this writ of entry became a writ of right, it should have all the consequences attending that writ, whose nature it had assumed by the manner of counting; so likewise, on the other hand, when a writ of right was turned into a writ of entry, as happened not unfrequently, it entirely ceased to be a writ of right in all respects, and there was no longer therein the *essoin de malo lecti*.<sup>2</sup>

Before more is said concerning the change of a writ of entry into a writ of right, and of a writ of right into a writ of entry, the reader must recollect that the writ of entry has already been spoken of as an invention since the time of Glanville; and was contrived, no doubt, to avoid the necessity of recurring to the duel and great assize, whose determination could never afterwards be re-considered. Thus this new writ was framed in the nature of that for which it was to be an occasional substitute; and so great an affinity was still discernible between them, that we see, in these and many other instances they were convertible, that is, either of them might become the other to all intents and purposes. How that was effected, will be rendered clearer by a few instances.

When it was attempted to convert a writ of right into a writ of entry by the counting, and the demandant said, that he was ready to prove it by a jury; yet it was in the election of the tenant whether he would put himself upon the jury to try the entry, because he had three remedies: for he might either defend himself by the duel, or put himself upon the great assize to try the right, or upon a jury to try the entry. Thus, as it was at the option of the tenant to choose which of these he pleased, the writ of right was not changed into a writ of entry (notwithstanding the counting), till the tenant had chosen to put himself on a jury to try the entry; as for instance, if a writ of right was brought containing the words necessary to include the *jus merum*; and then there was added this clause: *Et in quam non habet INGRESSUM nisi per talem antecessorem suum, qui terram illam ei dimisit ad certum terminum, &c.*, though these were words perfectly proper to bring in question the entry, and though it was within the time to prove it *proprio visu et auditu*; yet a writ of right would not, by so doing, become a writ of entry, but would continue as it was, unless the tenant voluntarily put himself upon a jury to try the entry.<sup>3</sup>

<sup>1</sup> Bracton, 317 b., 318.<sup>2</sup> *Ibid.* 318.<sup>3</sup> *Ibid.* 318 b.

A writ of entry was sometimes changed into a writ of right, not by choice, as in the above-mentioned change, but through necessity; either *propter longissimum ingressum*, the great distance of time at which the entry was alleged, or *propter donum et feoffamentum*. That was called *longissimus ingressus*, which could not be proved *proprio visu et auditu*, but was obliged to be proved by tradition; as *de visu et auditu patris*, who enjoined his son to give testimony thereof: in which case, out of necessity, from the want of proof, the tenant was forced to put himself upon the great assize, or defend himself by duel. Thus, suppose an entry was laid so far back as the time of Henry II. or later, yet so as not to be within the limitation of a writ of mortmain; as suppose thus: *Et unde A. non habet ingressum nisi per B. qui non nisi custodiam inde habuit, &c.*, and then was added, *et unde prædictus, &c., fuit seisitu in dominico suo, ut de feodo, et jure tempore talis regis capiendo inde expleta, &c., et de tali descendit jus, &c.*, as in a writ of right; in this case, the tenant was obliged to put himself upon the great assize, or defend himself by duel, for want of other proof: but, would the distance of time allow it, he might, if he chose, have put himself upon a jury to try the entry.<sup>1</sup>

Thus far for the change *propter longissimum ingressum*, or the antiquity of the entry. The other, *propter donum et feoffamentum*, was, where a feoffment was opposed to the entry, which might be stated in this manner by the tenant: *Defendit talem ingressum, et dicit, quòd habuit ingressum per antecessorem illum (de cujus seisinâ idem Petrus petiit terram illam) qui de terrâ illâ feoffavit eum tenendum pro homagio et servitio suo, et quòd tale fuit jus suum per feoffamentum et non per talem ingressum ponit se in magnam assisam*; upon which the assize proceeded to try the issue, whether the tenant had more right to hold the land for the homage and service by reason of the feoffment, or the demandant to hold it in demesne.<sup>2</sup>

To return from this digression upon the reciprocal changes of writs of entry and writs of right; and to go on with the manner of proceeding in a writ of entry. The process, as was before said, was the same as in the writ of right, and therefore need not be particularly noticed in this place. When both parties appeared, the demandant was to begin by stating his *intentio*. If he was only a tenant for life, he was to claim the land, *ut jus meum possessorium*; if in fee, *ut hæreditatem*; and then go on, *in quâ talis non habet ingressum nisi per talem, &c.* To this the tenant might answer by denying the right of the demandant *per talem*, and say, that he had not an entry *per talem* mentioned in the writ, but *per alium talem*; and of that he might put himself upon an inquest. It appears from Bracton that this inquest might be taken before the sheriff, and the *custodes placitorum coronæ in pleno comitatu*; and then there issued a writ of inquiry to the sheriff; or it might be *coram nobis*, or *coram justitiariis nostris apud West-*

<sup>1</sup> Bract. 318 b.<sup>2</sup> *Ibid.* 319.



*monasterium*: and in that case, there was a writ of *venire facias*, as it is since called.<sup>1</sup> Whether this matter was to be tried before the sheriff, or before the justices, depended probably upon the return of the original writ, which we have seen had sometimes the one, and sometimes the other return; or it might perhaps be at the option of the party to choose the sheriff; or the justices might reserve only such questions as were thought to be of great difficulty, to be tried at the bar of the court: but that in a *commune placitum* the jurors should be summoned to try such an issue *coram nobis*, seems very particular, and not easily to be accounted for.<sup>2</sup> When a *præcipe* was returnable before the justices assigned, the issue was, most probably, tried before them also; and probably it rested merely on the option of the demandant whether the original writ should have the one or the other return. It was not unusual to cause a jury which had been summoned before the justices assigned, to be removed into the superior court at Westminster; for which purpose there issued a special *venire facias*; and if the jurors made default, a *habeas corpora recognitorum*, which had sometimes a clause directing the sheriff to fill up what vacancies had happened among the jury by death or otherwise.<sup>3</sup>

We have above supposed that the issue went to a jury to be tried; but before this, it was necessary that both parties should take such steps to prove, or raise a presumption in support of their allegations, as was required in other actions determinable by jury. The *intentio* was not in this, any more than in other actions, to be taken on the *simplex loquela*,<sup>4</sup> of the demandant: he must produce proof, if he could; or, if he could not, he must raise a presumption by a *secta*, which was open for the other side to defend *per legem*. If the demandant had neither, the tenant had no need to answer the action at all, and the writ was lost; unless, says Bracton, as some thought, he might, and ought *de gratiâ justitiariorum*, to be assisted by a jury of the country (*a*). But this was to be only upon some good cause being shown: either that the instruments on which he relied for proof of the matter were lost; or that he had them not at hand, or could not get them without difficulty, to make use of on that occasion. In such cases, it seems, the court would direct the matter to be tried by a jury; and another day would accordingly be given to the parties.<sup>5</sup>

(a) "If 'suitors' of the manor or the hundred were tenants of one or other of the parties, it was recognised as a good cause for the removal of the case into the king's court, which could award the *venue* to be not of the county generally, but of *some other vill* or hundred, so as to exclude any from the particular place in question; as it was, if the case came into the county court, the case might come before *some* of the suitors of that very hundred or manor whom it was desired to exclude (*Year-Book*, 3 Henry VI., 39). So, if the case interested a corporation, or some person who was lord of the hundred, or the hundred itself, the case would be removed into the king's court, and the jury be directed to come from another hundred, not from the county at large (*Year-Book*, 15 Edward IV. c. 3; 22 Edward IV. 3; 31 *Assize*, 19. *Trial per frais*, 109).

<sup>1</sup> Bract. 319 a. b.<sup>2</sup> Bract. 325 b. 326.<sup>3</sup> *Vide ante*, 244. *Magna Charta*.<sup>4</sup> *Vide ante*, 248.<sup>5</sup> Bract. 820.



If the parties did not go to issue in the above way, it was because the tenant chose to except to the action. The exceptions he might make were many: he might say, that some one else had more right than the demandant; that another made the demise, and not the person named in the writ; that the term was not expired; or, if it was expired as far as limited by one instrument; that it had been enlarged by another, which he then exhibited; that the time exceeded the limitation in a writ of mortuancesthor, and therefore the proof would be defective. These and numberless other exceptions might be taken.<sup>1</sup> The tenant might vouch to warranty the person *per quem* he had his entry, and that warrantor might vouch another; and so on, to the fourth degree, but not beyond.

The writ of entry lay properly only against a freeholder; that is, one who had an estate for life, or in fee, or in fee-farm, and such only was considered as properly tenant. However, in truth, says Bracton, if this writ was brought against a farmer, it would not fail, for he might call his warrantor; and if he defended him, the farmer would retain his usufruct: if not, he might have his resort to the warrantor, as far as his usufructuary interest went; and the warrantor over against his warrantor, as far as his freehold interest was concerned (*a*). Notwithstanding what Bracton here says concerning a farmer, he afterwards lays it down most positively, in conformity with what was said above, that a writ of entry would not lie against one who held for a term of years, because he did not hold the freehold in demesne, but only the usufruct; and much less would it lie against a tenant from year to year.<sup>2</sup>

The writ of entry *ad terminum qui præteritit*, which we have hitherto been speaking of, lay for that person who had himself made the demise: when it was brought by the heir of the demisor, it was altered accordingly; as, *in quod, &c., non habet ingressum nisi per talem, cui talis pater*, or whoever the ancestor might be, *illud dimisit ad terminum qui præteritit, &c.*<sup>3</sup>

Thus were writs of entry varied according to the circumstances of the case upon which they were founded; and some of them received appellations from the effective words in the writ. One was afterwards called a *cui in vitâ*; which was brought by a widow when her husband had made a gift of her inheritance. This writ was in the following form: *Præcipe, &c., quòd, &c., reddat tali*,

(*a*) The tenant might pray in aid a third party. Thus, in a writ of entry, when the demandant alleged that the tenant only entered under one G., who had wrongfully disseised the demandant; and the third party, G., could come forward and show that he had the reversion in fee, and pray to be allowed to defend his right (*Year-Book*, 3 Edward II. c. 64). It was a great principle of the common law, carried out by a statute of Edward I., not to allow the right to the inheritance to be debated and decided in the absence of the party entitled to it, if he chose to appear and defend it. After the lapse of centuries, the same great principle of procedure still prevails and applies; and thus the present practice to let in the landlord to defend an ejectment, which Lord Mansfield in his time traced to this ancient doctrine of the common law; so enduring is a *principle* founded on substantial sense and reason.

<sup>1</sup> Bract. 320 b.

<sup>2</sup> *Ibid.* 321. *Vide ante*, 302, 303.

<sup>3</sup> Bract. 321.

*quæ fuit uxor talis, &c., quam clamant esse jus et hereditatem suam; et in quam prædictus talis non habet ingressum nisi per præd. quondam virum suum, qui illud ei dimisit, cui ipsa in vita sua contradicere non potuit, &c.*<sup>1</sup> The usual answer to this action was, that the wife appeared on such a day personally in the king's court, and there, of her free will and consent, granted and confirmed the gift made by the husband; for proof of which the record thereof was to be inspected, where there ought to be special mention made that the woman consented: upon such consent, says Bracton, a chirographum was made, which, together with the record, was now vouched; for it was a rule, that the record, without a chirographum would not bar the widow's action. In other words, this was a plea of a fine. If a gift by the husband was what they called *voluntary*, it was not valid without the above circumstance of the woman's consent signified in court: but if the gift had been made, as they called it, *in causâ honestâ et necessariâ*, as to a son, or with a daughter in marriage, then it was binding upon the wife without these solemnities.<sup>2</sup>

Again, in case of a voluntary alienation of the wife's land by the husband, if she died before him, then the son who was her heir might have a writ of entry in the following words: *In quam non habet ingressum nisi per talem virum ipsius talis, cujus heres ipse est, qui illum ei vendidit in vitâ suâ cui prædicto talis in vitâ suâ contradicere non potuit, &c.*<sup>3</sup> If a second husband aliened the wife's dower by her first husband, she might, after his death, have a writ of entry, *quam clamant esse rationabilem, &c., et in quam prædictus talis non habet ingressum nisi per talem*, her second husband, *qui illud ei dimisit, cui ipsa in vitâ suâ contradicere non potuit, &c.*, and the heir of her first husband, in case she died before her second husband, might have a writ of entry applicable to the nature of his claim, whether the second husband held himself in seisin, or the wife had aliened: *In quam non habet ingressum nisi per talem, qui illud ei dimisit, et qui illud tenuit in dotem talis uxoris, &c.*, or, *nisi per talem, quæ fuit uxor talis, quæ illud tenuit in dotem, &c.*<sup>4</sup>

The cases in which a writ of entry was the proper remedy, were very numerous. We shall enumerate some of them. If an abbot, prior, or bishop, demised without assent of the chapter, or the chapter without assent of those whose assent was required by law; then there was a writ, *non habet ingressum, nisi per talem quondam abbatem, &c., qui illud ei dimisit SINE ASSENSU CAPITULI*,<sup>5</sup> and the like. The writ here mentioned was called a writ of entry *sine assensu capituli*. So if a wife demised without assent of her husband, *non habet ingressum nisi per præd. talem mulierem, quæ illud ei dimisit sine assensu et voluntate prædicti talis quondam viri sui, &c.* So if a bailiff demised without the consent of his lord. If a

<sup>1</sup> Bract. 321 b.<sup>4</sup> *Ibid.* 323.<sup>2</sup> *Ibid.* 321 b. 322.<sup>5</sup> *Ibid.* 322.<sup>3</sup> *Ibid.* 322.

tenant was convicted of felony, the lord might have a writ to recover his escheat: *Non habet ingressum nisi per C. de N. qui eam TENUIT, &c., ET QUÆ, &c., ESSE debet ESCHÆTA propter feloniam de quâ idem C. &c., convictus fuit et damnatus, et quum terram idem C. dimisit, &c.*, which was called a writ of escheat. Again, if any one had his entry by one who held in villenage; by one who was *non compos sui nec sanæ mentis*; by one who held only for life, whether in dower or *per legem terræ*; the remedy was by writ of entry. In cases of a writ brought by the reversioner after an estate for life, the writ, after *ut dicit*, always had these words: *unde queritur, QUOD ipse talis injustè EI DEFORCEAT, &c.*,<sup>1</sup> from which words the writ was afterwards named *quod ei deforceat*.

A writ of entry lay, if any one intruded into the inheritance; *non habet ingressum nisi per hoc, quod ipse se intrusit, &c.* If a man aliened land of which he had the custody; *non habet ingressum nisi per C. qui non nisi custodiam inde habuit, &c.*, with some small difference in the words when the heir claimed of his own seisin, and when of his ancestors; *dum idem B. fuit infra ætatem in custodiâ, &c.* It lay when a common of pasture was demised; *non habet ingressum nisi per C. (cujus hæres idem B. est) qui pasturam illam ei dimisit, ad terminum qui præterit, &c.* But it only lay of a common in certain.<sup>2</sup> These, in addition to such writs as have been mentioned in the former part of this chapter, are all the writs of entry to be found in Bracton. These are applicable to very many cases of ouster of freehold; and from the general conception, of *ad terminum qui præterit*, and the infinitude of circumstances and situations which might be included within those general words, it was possible to make this remedy much more universal.

We have before examined whether a writ of entry would lie *against* a farmer, or tenant for a term of years.<sup>3</sup> We shall now see whether it would lie *for* persons of that description. It is said by Bracton, that a farmer who had demised *ad terminum qui præterit*, might demand his own seisin, though he had no right in the freehold; for he had a possessory right of some kind or other; and therefore according to our author, was entitled to an action grounded upon his own demise, and his own act. A writ of entry, however, brought by one who held for term of years, or for life, could never be turned into a writ of right; it being a rule, that an action upon the possession, merely, should never be turned into an action upon the right, nor *è converso*.<sup>4</sup>

Notwithstanding what was before said, of a writ of entry being limited to the time to which a writ of mortaucestor was confined, there was a case, where, of necessity, and because no other action could be had, this writ would lie beyond that period: as where one who held only for life, demised for a very long term, which exceeded the period of a writ of mortaucestor; and then as he had not such an interest as would entitle him to a writ to try the

<sup>1</sup> Bract. 323 b.<sup>2</sup> *Ibid.* 324, 324 b.<sup>3</sup> *Vide ante*, 393.<sup>4</sup> Bract. 326 a. b.

mere right, he was allowed to try the entry by a jury; as also was a tenant in fee, in the like circumstances, who could not count *de usu et expletis*, which was always necessary in a writ of right.<sup>1</sup>

Another limitation of this action was the degrees within which it was confined. It never was allowed beyond three degrees; which were reckoned in this way. If the writ was of the kind we mentioned first, *ad terminum qui prateriit*, on the demandant's own demise, this was one degree. If the tenant was said to have his entry *per* such a one, that constituted two degrees. If the entry was *PER* such a one, *CUI* the land in question was demised by some ancestor of the demandant, this was in the third degree.<sup>2</sup> A writ of entry was not allowed beyond this, and the party must, in case his demise was further removed, have recourse to a writ of right. It is stated by Bracton as a question, whether the passing of land from an abbot to his successor was counted as a degree, in like manner as from one heir to another; and he thought not: for though the person was changed, yet the dignity and capacity, which was the principal consideration, remained the same.<sup>3</sup>

<sup>1</sup> Bract. 326 b.

<sup>2</sup> Flota, 360.

<sup>3</sup> Bract. 221.

## CHAPTER VII.

### HENRY III.

*Writ of Right in the Lord's Court—Process in Real Actions—Summons—Of Essoins—De Mulo Lecti—Defaults—Magnum Cape—Warrant de Sereitio Regis—Parvum Cape—Writ of Quo Warranto—The Count—Tender of the Demi-Mark—Defence—Of granting a View—Vouching to Warranty—Nature of Warranty—Proof of Charters—Warrantia Chartæ—Of Pleading—Of Prohibitions—Attachment sur Prohibition—Of Jurisdiction—Abatement of the Writ—Pleas to the Person—Of Bastardy—Writ to the Ordinary—Of Minority—Excommunication—Parceners—Pleas to the Action—Non Tenure—Majus Jus—Release—Fine and Non Claim—Of Personal Actions—Attachment—Execution of the Writ.*

HAVING gone through assizes and recognitions, which went upon a possessory right, to recover a man's own seisin, or that of his ancestor, and also suits upon an entry, it remains only to speak of an action for the recovery of a right and property grounded either upon a man's own seisin, or that of his ancestor, who did not die thereof seised; in which action both the right of possession and the right of property were determinable; and after judgment therein, either upon the assize or duel, no recourse could be had to any other remedy, the judgment being, that the demandant should recover seisin to him and his heirs quietly, as against the tenant and his heirs for ever.<sup>1</sup>

The writ of right and the proceedings thereon are treated more fully by Glanville than any other action; but this, as well as other branches of learning, had made great advances in improvement since the time of that writer: these are stated very minutely in the great authority by which we are so much assisted in our inquiries during this reign; and we should not fulfil our duty to the reader if we withheld such further information as can be derived from that source, on so important an article as the proceeding in a writ of right. Should the reader be a little retarded by sometimes recurring to what has been before said on the same subject, it is to be hoped that, on this, as on other occasions, his patience will be rewarded by the new lights which he will thence receive, to guide him in the future progress of this history.

The writ of right to the lord's court underwent no change in its form and language, though that in the king's court had some few words inserted which were not in it in Glanville's time (*a*). The words which mention the land to be held of the king *in capite* were probably added in consequence of the provision of *Magna Charta* about *præcipes in*

Writ of right  
in the lord's  
court.

*capite*, with design to show that the present was a proper subject for the king's court, and not within the prohibition of that act.<sup>1</sup> The writ ran thus: *Præcipe, &c., quòd, &c., reddat, &c., tantum terræ, quod clamat esse jus et hereditatem suam, et tenere de nobis in capite; et unde queritur, quòd, &c.*, and so on, as in the old writ; only the return was *coram justitiariis nostris apud Westmonasterium*.<sup>2</sup>

Since the provision of *Magna Charta* about *præcipes in capite*, writs of right were, of course, more generally brought in the lord's court, and from thence were removed to the county, and sometimes to the superior court. The removal to the county was allowed only when the lord was proved *de recto defecisse*. Many were the occasions when this failure of justice might be said to happen; as when the deforçant claimed to hold of a different lord from the demandant; when the real lord had no court, or refused to hear the cause, or no one was in court to hear it; in which cases, recourse could not be had to the chief superior lord, because the writ directed particularly, *si, &c., non fecerit, vicecomes hoc faciat*. Again, if a person who lived out of the lord's jurisdiction was called to warranty, if the deforçant essoined himself *de malo lecti* out of the limits of his jurisdiction, where the four knights could not make the view; if the tenant put himself on the great assize: all these, and an infinitude of other matters, were causes of removal, as producing a failure of justice. The method of proceeding in the lord's court was different in different places; only in praying a view, vouching to warranty, and sometimes in pleading, in waging duel, and in some other matters, the course of the king's court was observed.<sup>3</sup>

When the officer, or serjeant sent by the sheriff, had attested in the county court that there was a failure of justice in the lord's court (and the officer's report in this point was a record), then the demandant prayed the judgment of the court thereon; and accordingly the tenant was commanded to be summoned to answer at the next county court, at which time they might either appear or esoin themselves. If the demandant appeared, but the tenant did not, then, upon the summoner attesting the summons, he was proceeded against for the default, according to the custom of different counties, either by caption of the land into the king's hands, or otherwise. The custom in the county of Lancaster, which is said to have been approved by the famous Pateshall, was this: the tenant was summoned twice, and if he did not then appear, and the summons was proved, the judgment of the court was, *quòd capiatur parvum nampium* on the land, in name of a distress, and the tenant was summoned a third time to appear at the third county; if he did not then come, the judgment was, *quòd capiatur magnum nampium*, that is, the *averia* and chattels, double the first, by way of afforcing the distress, and he was summoned a fourth time,

<sup>1</sup> *Vide ante*, 250.<sup>2</sup> Bract. 328 b.<sup>3</sup> *Ibid.* 329 b.

when, if he did not come, there was a *capiatur terra* into the king's hands, and a fifth summons; and if he appeared not, nor replevied the land, the demandant had judgment to recover seisin by default.<sup>1</sup> From this specimen of the practice in the county of Lancaster, we are left to conjecture what was the nature of that in other counties.

While the suit was in the county court, if a person was vouched to warranty, that court could not summon the warrantor, but recourse was had to the king's writ *de warrantia*, which commanded the person to warrant the land in question in the county; *et nisi fecerit, quòd sit in adventu justitiariorum, &c.*: so that, if the warrantor did not enter into the warranty in the county, day was given to all the parties before the justices *in itinere*, where the plea of warranty was determined, and then the principal suit was remanded back to the county court, if the justices so pleased, though that, as well as the warranty, might, *de gratia*, if they pleased, be determined before them without any writ of *pone*.<sup>2</sup>

If the tenant put himself upon the great assize, a day was given to the next county; and, in the meantime, he applied for a writ of peace till the coming of the justices at the next assize, which writ he was to obtain in person, because he was to make oath that he was tenant, and had put himself on the assize. The writ of peace, the prohibition to the sheriff, that for summoning the knights, and the assize, were much the same as in Glanville's time, both in the words and the practice of them; only the jurors were to appear *coram justitiariis ad primam assisam, &c.*<sup>3</sup>

Should a suit be removed by *pone* from the sheriff's court to the court above, in the interval, before the warrantor appeared before the justices itinerant, there was, however, no mention of the warranty in the writ of *pone*; but after the usual essoins and delays, the demandant counted afresh, from the day on which the vouching was in the county; and so the tenant was obliged to vouch again, and the day appointed before the justices itinerant became void.<sup>4</sup>

A writ of *pone* was rarely granted on the prayer of the tenant, except for some special reason, which was to be expressed in the writ; as thus: *Pone ad petitionem tenentis eò quòd agit in partibus transmarinis, &c., loquelam, quæ est, &c.* If the tenant could not appear, if the demandant was related to, or a servant or friend to, the sheriff; if he was very powerful in the county, or was sheriff himself: all these were causes sufficient to entitle the tenant to remove the suit (a). There were some cases in which the demand-

(a) In the county court, it is to be observed, the suitors or freeholders were the judges (*Year-Book*, 7 Edward II., f. 245), but not necessarily the *triers*; and they could, and at this time did, resort to juries for *trial*, although the jurors were at this time still regarded as *witnesses*; and the reason twelve were chosen was not that all must necessarily join personally in the verdict, but that some out of the number might be enabled to testify, and return a verdict of which the others may approve. Hence it was necessary to a jury that there should be twelve, even in the county court; and therefore, where on an issue joined in the county court, only six suitors could be obtained to try the case, it was removed into the king's court, and a jury

<sup>1</sup> Bract. 330.<sup>2</sup> *Ibid.* 331.<sup>3</sup> *Ibid.* 331, 331 b., 332.<sup>4</sup> *Ibid.* 332.

ant was obliged to remove the suit, on account of the privilege of the tenant; as where he was a Templar or Hospitaller, or of any other description of persons who had the privilege of answering to no suit, except *coram rege, vel ejus capitali justitiario*. There were cases of necessity in which also the suit was to be removed; as where bastardy or anything else was objected, which the county could not legally decide or try.<sup>1</sup>

In the same manner were suits removed from the county and court baron to the justices *in itinere*. There was also another cause of removal from the county court. This was on account of a false judgment, in which case, likewise, the removal was by *pone*.<sup>2</sup>

When the suit was thus removed by *pone*, the tenant was to be summoned to appear. The summons of the tenant is treated of by Glanville. Some few things may be added to render his account more satisfactory, as well as to give a comparative view of process in general, whether in actions real, personal, or mixed.

The most common process in use was the summons (*a*); and after that, in some cases, there followed either a caption Process in real actions. into the king's hands for default, or an attachment, according to the nature of the action. Another process was, what Bracton calls a command or precept of the king, without any other

was awarded *de vicineto* (*Year-Book*, 7 Edward II., 238). The case might be removed into the king's courts of oyer and terminer, which were courts of the county, though not county courts (*Year-Book*, 7 Edward II., f. 231). If witnesses resided in different counties, as they would at this time be summoned as jurors, and the courts of the county could only summon the men of the county, that again would be a reason for removal into the king's superior court, which would have jurisdiction over the whole country (*Year-Book*, 7 Edward II., c. 231).

(a) Very early in the history of our law, it was recognised that it was part of the king's prerogative to see that justice did not fail. Before the Conquest, this was by writ to the sheriff, to direct him to hear the case in the county court (*Mirror of Justice*, c. 152); but after the Conquest it was recognised that causes of weight or doubt should not be allowed to be tried in the county court or other local tribunal, nor any cause in which it was likely for any reason that justice would fail. Hence, in the *Leges Henrici Primi*, among the king's prerogatives is mentioned "defectus justitiarum" (c. 10); and it is said that "defectus justitiarum et violentia recti eorum destitutio est qui causas protrahunt in jus regum" (c. 33). Before a "curia regis," as a permanent regular judicial tribunal, was established, causes were removed into the courts held by the king's justices itinerant; and thus it is said in the *Mirror*, that such cases as were too high for the sheriff to try in the county court were suspendable until the coming of the justices in eyre unto those parts (c. 2, s. 28). In the reign of Henry II., however, the *curia regis* (exchequer) heard common pleas, which were then removable there. There were many modes in which a failure of justice, i.e., an evident necessity for its failure, might arise to warrant a removal from the local court, or even the county, whether, for instance, from defect of jurors, or want of power to summon witnesses. And it is to be borne in mind that at this time jurors were witnesses. Thus in an assize of novel disseisin, when the tenant set up a release, the witnesses of which were in divers counties, the case was removed into the king's court at Westminster, which had jurisdiction over the whole country (*Year-Book*, 7 Ed. II., f. 231). So, where an issue was joined in a local court in a writ of right, and only six suitors could be obtained to try the case, it was removed into the king's superior court, and a jury was awarded, "*de vicineto*" (*Year-Book*, 7 Ed. II., fol. 238). In the county courts or courts-baron, it will be observed that the freeholders or "suitors" were judges (*Year-Book*, 7 Ed. II., f. 249), but not necessarily the *triers*, as they could try by jurors or sworn witnesses of the matter. But in each local

<sup>1</sup> Bract. 332.

<sup>2</sup> *Ibid.*



summons, *quòd sit coram eo responsurus*, or *facturus*, &c., or that he should have such a one there, *ad respondendum*, or *faciendum*. There was another, commanding the sheriff, *quòd faciat venire*, or *quòd attachiet*, or *quòd habeat corpus*, or *quòd ita attachiet quòd sit securus habendi corpus*. Many of these have been noticed in the foregoing account of proceedings. We shall now confine ourselves more particularly to the summons, which was the usual process in real actions, as well those that were possessory as those that concerned the *proprietas*; and also in personal actions, in matters of contract, or for any injury.

A summons was either *general*, or *special*. There was a *general* summons before the eyre was held; this was to be in some very public place, and might be followed by essoins, to excuse the absence of those who ought to attend. A *special* summons was in some particular action, to which if a person did not appear, he would be in default, although he was essoined upon the general summons (a).<sup>1</sup>

court the judges or jurors must come from the freeholders, suitors to that court. And therefore, in a hundred court or court-baron, where the number of suitors was small, it might often be that there were causes which would prevent a fair and proper trial, as if the lord, in the hundred court or court-baron, or the sheriff in the county were interested (*Year-Book*, Henry IV.; 14 Henry VI. f. 1); or any great nobleman of much influence in the county (*Year-Book*, 32 Henry VI. 9); or if there were great writs raised on one side or the other (*Year-Book*, 7 Henry VI. f. 9; 32 Henry VI. f. 9; 3 Henry VI. f. 24); for though (as it was then said) the other party might be willing to refer the case to arbitrators chosen by *both*, for they would be indifferent; yet, where any of the jurors were chosen by one side only, it was a good cause of challenge (*Ibid.*). There were various modes provided for removing causes from the local courts into the king's court, as writs of *pone* or *recordari* (*Year-books*, 7 Edward IV., 23; 34 Henry VI. 4). The plaintiff could always remove, the defendant not without cause (*Fitz. N. B.* 70).

(a) Two things are remarkable here, how closely the *Mirror* follows Bracton in the chapter on "summons," and how entirely the present law, after the lapse of seven centuries, has gone back to what it was in the time of Bracton, inasmuch as summons is now the only process for the commencement of all actions, real and personal. The chapter in the *Mirror* distinguishes special summons from general, and treats of special summons just as Bracton does. Treating of what is a reasonable summons, it says, "It is a reasonable summons when it is testified by two credible witnesses, neighbours to the person, or house, or tenement named in the writ, with a warning given of the day, place, party, judge of the cause, and a reasonable respite—at least fifteen days—to provide his answer, and to appear in judgment" (c. ii. s. 29). Here, again, it may be observed, that fifteen clear days is now the period allowed in actions of ejectment, the only remedy for the recovery of real property. And Bracton says, "*Sciendum quod quindecim dies ante diem summonitio dici debeat legitima. Si autem minus spatium contineat possit illegitima judicari nisi ob causam legitimam minus tempus statuatur. Ut si propter causam quæ instantiam desiderat, propter rem fortè quæ tempore peritura sit, vel propter alias causas ubi induciæ arbitrarie sunt, propter necessitatem, item propter personas qui celerem habere debent justitiam, sunt mercatores, &c., et sic ex causa moderatur tempus summonitionis et contineat minus tempus,*" &c. (*Ibid.*) The same distinction was drawn through the entire procedure. See the chapter "De Essoniis." Glanville also states that there were no essoins, i.e., excuses for non-appearance, allowed in assizes of "novel disseisin," i.e., recent forcible dispossession, as these cases raised no question of difficult or doubtful right. On the same principle, Fleta says that in mercantile causes (*causæ mercatorum*) less time will be sufficient than in real actions (lib. vi. c. vi. s. 11). So, in criminal cases, process was more speedy, and Coke says might be returnable the same day (2 *Inst.* 568).

<sup>1</sup> Bract. 333.

What we have to say upon summons will be chiefly confined to this latter kind. It appears from Bracton, that if the party could be found anywhere in the county, he might be summoned; though if the summoners could not find him at his own house, they needed only show the summons to some of his family, and not seek him further. If he had more houses than one in the county, the summons was to be at that where he mostly lived, or had the most substance; if he had no house nor demesne, it was to be at his fee. The summoners were to be at least two in number, who were to testify before the court that they had executed the summons. A summons ought always to be served fifteen days before the day on which the party summoned was to appear; and if there were fewer days, the summons was illegal, unless in some particular cases where despatch was required: as when a church was vacant; when the parties were living in the county where the eyre was; or in cases where merchants were concerned, who were entitled to what Bracton calls *justitia pepoudrons*. Again, on the other hand, sometimes a longer time was allowed for summoning; as on account of a journey; and the time was lengthened according to the length of such journey. But the common and legal summons, says Bracton, was fifteen days before the appearance.<sup>1</sup>

A summons was illegal, if it was made only by one summoner; or by false summoners, and not by the sheriff and his bailiffs. Again, if it was made when the tenant was beyond sea, or upon his journey, or even *cum iter arripuerit*, when he was just set out; or if he was not found within the county, the summons was not binding;<sup>2</sup> for a man was not to accept a summons at all times and places, nor from everybody, but only from those who had a proper authority.

When the tenant appeared, he might object any of the above irregularities as an exception against the summons. If he did not appear at the day of the summons, and the sheriff did not return the writ, recourse must be had to another writ, that being now out of date; but if the sheriff had returned the writ, then, on account of the tenant's default, if it was in a real action, his land was taken, as in Glanville's time; but the writ on this occasion was now called *magnum cape*; and if, after the first caption, he failed appearing at another day, he lost his seisin. There was another caption of the land by force of a writ that was called *parvum cape*; in all defaults after the first appearance the caption was made by *parvum cape*, which was the case in which Glanville says he could not replevy.<sup>3</sup> Thus, whereas in Glanville's time the caption was not till the tenant had been summoned three times, it was now after the first summons that the *magnum cape* issued.

If a person was lawfully summoned, and did not appear, he would be punished as a defaulter, unless he could send a proper excuse or essoin. The law of essoins has already been mentioned;

<sup>1</sup> Bract. 333 b. 334.<sup>2</sup> *Ibid.* 336 b.<sup>3</sup> *Vide ante*, 114.

but it is treated so minutely by Bracton, and was of such importance in the judicial proceedings of this period, that it deserves to be re-considered.

One principal excuse for not appearing to a summons, was being *in servitio regis* (a). This, however,<sup>1</sup> was not admitted as an excuse if the party had been first summoned, because he might have sent his attorney to appear for him; nor even then would it avail, if he could conveniently come himself, or send. But this is laid down as the strictness of law by Bracton, who admits that the king's pleasure should prevail, notwithstanding any of the above circumstances. The next essoins were what were called in Glanville's time, *ex infirmitate veniendi*, and *ex infirmitate*<sup>2</sup> *reseantisæ*, which were now termed *de malo veniendi*, and *de malo lecti*. Besides these, there were several others that recurred less frequently; as a peregrination, or any restraint imposed on a party; or if he was detained by enemies, or fell among thieves;<sup>3</sup> or was stopped by floods, a broken bridge, or tempest; unless, indeed, it could be proved that he set out at an unseasonable time, or suffered those impediments through want of proper caution and care on his part. Being impleaded in the king's court, was a good reason for not attending in an inferior one; or even, according to Bracton's opinion, being impleaded in the ecclesiastical court was a good excuse.

A person having any of the before-mentioned excuses ought to send one to make it for him. The form of making the essoin was to say, "that his principal, as he was coming to the court (if it was the essoin *de malo veniendi*), was seized with an infirmity in the way from his house to the court, so as not to be able to come either *pro lucro* or *pro damno*, and that he was ready to show this." It was not now the practice, as it had been,<sup>4</sup> for the essoniator to give any surety for proving the truth of this, but credit was given to his verbal declaration; though it seems, that in the case of barons, and other great persons, who could better command a security, the law imposed on them the burthen of finding pledges. In common cases, therefore, the essoniator gave his faith, that he would produce his principal at another day, to warrant the essoin, and prove it<sup>5</sup> upon his oath.

As in actions, so in casting essoins, a certain order was to be observed: thus, if a person was detained by some illness, he would cast the essoin *de malo veniendi intra regnum*, and this might be followed by that *de malo lecti*; after this, the party would not be

(a) Here again the *Mirror*, in a chapter on the subject, follows Bracton, "Essoin is an excuse of a default by any hindrance in coming to the court, and lieth as well for the plaintiff as the defendant. The law of every essoin is that the cause of the hindrance is to be enrolled with the name of the essoiner, so that if the adverse party or his attorney or essoiner will traverse the cause, he is to be received so to do; that if it be found false, then the essoin be turned to a default." Hence the various essoins or causes of excuse are stated very much the same as in Bracton (c. ii. s. 30).

<sup>1</sup> Bract. 336 b.

<sup>4</sup> *Vide ante*, 115.

<sup>2</sup> *Vide ante*, 115.

<sup>5</sup> Bract. 337 b.

<sup>3</sup> Bract. 337.

permitted to remove himself *extra regnum*, so as to cast the essoin *de ultra mare*. The essoin *de ultra mare* was of various kinds, namely, *de ultra mare Græcorum*, and *de citra mare Græcorum*. In the simple essoin *de ultra mare*, there was a delay of forty days at least, and one ebb and one flood. If there was mention of any remote place, accompanied with some cause of necessary absence, as a peregrination to St Jago, or being with the army in Germany or Spain, then a longer time was allowed, according as it should seem proper to the justices. The same discretion might be exercised by the justices, where the absence was in some distant part of the kingdom; but they could never shorten the legal period of fifteen days. The essoin *ultra mare Græcorum*, was usually in cases of peregrination to the Holy Land. And here they made a distinction between a *simplex peregrinatio* and a *generale passagium*. In the former, the time allowed was, at least, a year and a day:<sup>1</sup> in the latter, the plea remained *sine die*. This latter privilege was granted in favour of those who were *cruce signati*, and it seems to have been allowed in consequence of a papal decree which declared, that till the death or actual return of such persons, all their property should remain entire and untouched.

It was held that a person might have the essoin *de peregrinatione ad Terram Sanctam*, and afterwards that *de ultra mare*: and then when he returned he might have that *de malo veniendi*, and afterwards that *de malo lecti*: but if he had had that *de malo veniendi*, he could not, as was before said, recur to that *de ultra mare*; and if he had had that *de ultra mare simpliciter*, he could not have that *ad Terram Sanctam*, the rule of essoins being *appropinquare possunt regno, cum fuerint implacitati elongare autem non*. A person who was absent upon a *simplex peregrinatio*, and stayed beyond the year and day, might have another forty days, and one flood and one ebb, by reason of the essoin *de ultra mare simpliciter*; and if he still stayed, he might have fifteen days at least, by an essoin *de malo veniendi citra mare*, and if a reasonable cause could be showed, the justices, as we have before seen, might allow more. After this, if he did not appear, he would be in default.<sup>2</sup> Indeed, when a person, by casting the essoin *de malo veniendi*, admitted himself to be on his road to the court, there would have been an absurd contradiction in allowing him to cast another, which expressed that he was out of the kingdom. The essoin *de servitio regis* was likewise sometimes *in regno* and sometimes *ultra mare*, and this likewise was sometimes followed by that *de malo veniendi*, and afterwards by that *de malo lecti*.<sup>3</sup>

The essoin *de servitio regis*, which was more peremptory than any of them, being without any limitation of time, was not allowed in certain pleas. Thus, it was not allowed in an *assize ultimæ presentationis*, for fear of the lapse; nor in dower, because of the consideration due to a widow who had only a life-estate; nor, as

<sup>1</sup> Bract. 378 b.<sup>2</sup> *Ibid.* 339.<sup>3</sup> *Ibid.* 338 b.

some thought,<sup>1</sup> in the *assisa mortis antecessoris*, in favour of the infant. It did not *de jure* lay for a person not immediately in the king's service, though it was allowed *de gratiâ*, as was before said; nor for one constantly in the king's service, unless while he was actually employed in some expedition: it did not lay for the attorney, as a person so engaged should not be an attorney. Bracton repeatedly lays it down, that the king's warrant for this essoin should never be granted but on a reasonable cause; though, on the other hand, he is as explicit in declaring that, whatever might be the cause, the justices should not quash it, but wait the king's determination thereon.

The essoin *de malo veniendi* implied that the party was taken ill on the road, and therefore, if the essoniator, upon interrogation, said he left him ill at home, it would not be allowed, though a case might happen, where of necessity it must be received; as if the party had been essoined *de malo lecti* in some other action, and *languor* was adjudged, he must, under that return, confine himself to his house; and therefore, when summoned in another action, and entitled to the essoin *de malo veniendi*, it must of necessity be received, though he was actually in his own house. The confinement which the adjudication of *languor* imposed on the party dispensed with the strictness otherwise observed in this and some other cases.<sup>2</sup>

Having thus mentioned generally the nature and effect of these essoins, it next follows that we should inquire by whom and where they might be used. In the first place, no minor, when known to be such, could essoin himself; nor could a person of full age be essoined against him, especially in an assize; for a person of full age, if present, could say nothing to prevent the taking of the assize, though it should seem as if he might be essoined in a suit for land of which he was first enfeoffed himself. The reason given by Bracton why a minor should not be essoined is, because he could not swear nor warrant the essoin. No essoin lay for a disseisor, for though he did not come, his bailiff might; nor for the bailiff. This rigid practice seems to be *in odium spoliatoris*,<sup>3</sup> who ought not to be indulged with a delay of fifteen days, though it lay for the demandant, who was the person spoiled. It did not lay for one committed *corpus pro corpore* in custody to answer, nor for any one where the sheriff was commanded *quòd faciat eum venire*, or *quòd habeat corpus ejus*, if the process had gone through the whole *solemnitas attachiamentorum*; but on the first day of attachment the party might have an essoin; for it was a general rule, that *de jure* an essoin might follow every summons or attachmant where a plea depended; on the contrary, it was a rule, *ubi nullum placitum, ibi nullum essonium*.

An essoin did not lay for a person who had appointed an attorney, unless they had by accident both essoined themselves, nor for one who had already essoined himself till he appeared, nor for one ap-

<sup>1</sup> Bract. 339 b.<sup>2</sup> *Ibid.* 340.<sup>3</sup> *Ibid.*

pealed *de forcâ*, nor in an appeal *de pace*, *de playis*, or *de roboriâ*, notwithstanding which it is laid down by Bracton, that if such persons did not appear, they would be excused by proper essoin. Sometimes there would be a *dies datus consensu partium sine essoino*, and in such case, neither would be permitted to essoin. If a person was seen in court before the essoin was cast, the essoin would, nevertheless, be admitted. An essoin would not lie after a caption of land *in manus regis* for a default.<sup>1</sup>

If a writ was against several who held *in communi simul et pro indiviso*, each might have an essoin *de malo evocandi* together on the same day, or one after another on diverse days,<sup>2</sup> till each had had an essoin; and none should have more than one essoin till all had appeared together, so that those who were essoined first might have several appearances, and several days, till all appeared together; but an essoin was not allowed at every appearance, on account of the infinite delay this would occasion. If the inheritance had been divided, and one was impleaded alone for his part, and he declined answering without his *participes* or parceners, and they were summoned, each had one essoin before appearance but not *vicissim*, till it was established that they were *participes*, and then they essoined *vicissim*, as before mentioned. If the tenants to the writ were not *participes*, but held by different rights, they could not essoin *vicissim*, because these were different pleas; the same where they held *pro diviso*. But husband and wife might essoin *simul et vicissim*, like *participes*, on account of the entirety of their rights; and if one made default, it affected them both, which was not the case even with *participes*.<sup>3</sup> When all the parceners had appeared together, and it happened that one or more of them afterwards essoined himself, or a day was given to the parties, if present, they might recommence their essoins, as at the first day of summons. In like manner, if the writ contained more than one demandant, whether they were *participes* or husband and wife, they might essoin *simul et vicissim*.

If a demandant or tenant, not choosing to appear himself, appointed an attorney, then the essoin was to be made in the person of the attorney and not in that of the principal, except, as will be seen hereafter, in the essoin *de malo lecti*.<sup>4</sup> Yet, if the attorney should die, the principal might essoin himself and his attorney *de morte*, as it was called, and he might remove his attorney and essoin himself; but it was only in these two cases that the party could cast an essoin after appointing an attorney.<sup>5</sup>

If one or more persons were vouched to warranty, before appearance both voucher and vouchee might have an essoin; and if the vouchers were more than one, they might essoin *simul et vicissim*, as before mentioned; so if the tenants were more than one.<sup>6</sup> After the wager of duel, the champion as well as his principal might essoin *simul et vicissim*.

<sup>1</sup> Bract. 341.<sup>4</sup> *Ibid.* 342.<sup>2</sup> *Simul et vicissim.*<sup>5</sup> *Ibid.* 342 b.<sup>3</sup> Bract. 341 b.<sup>6</sup> *Ibid.* 343.

The time for making the essoin was the first day, that is, on the return of the writ; and it was not sufficient, says Bracton, if the essoin was made on the second, third, or fourth day; yet, adds the same authority, the person summoned was to be *expected* till the fourth day, in case he should come or send a messenger to excuse his absence, if he had such matter to allege as would constitute a good essoin; and if he had, and caused himself to be essoined even on the second or third day, it seems, from Bracton, that the essoin would be allowed, and a day would be given him by his essoniator; yet, at that day, if the demandant pleased to proceed on the default, the court would allow him so to do; and if the tenant could allege none of the excuses above mentioned for his delay, he would lose his seisin.

The essoin was to be made in open court, before the justices; nevertheless, if by mistake it was made before another, it was allowed *de gratiâ*, like the essoin cast after the first day, as just mentioned; and the default would be saved, unless the demandant proceeded for judgment on the default, when such an essoin would be adjudged to be null and void.

An essoin might be had upon every appearance and day given in court, whether on praying a view, vouching to warranty, or on a day given *spe pacis*, as it was called, at the prayer of the parties, in order to compromise the matter in dispute, or for any other purpose.<sup>1</sup>

The essoin that occasioned most discussion in the practice of real actions was that *de malo lecti*, which commonly followed immediately upon that *de malo veniendi*; for where a person, having been detained on the road by sickness, and having cast the essoin *de malo veniendi*, had found himself obliged to return home, the order of essoins, conformably with what was likely to be the real fact, led to the essoin *de malo lecti*. Upon this, it was usual for the court to direct *a view*, to see whether it was, as they called it, *malum transiens*, or whether it was *languor*: if the former, then he had another day, at the distance of fifteen days at least; if the latter, he had the space of a year and a day. But the essoin *de malo lecti* did not in all cases follow that *de malo veniendi*. It did not follow it in a writ of entry, unless when the writ of entry was turned into a writ of right by the form of counting; so on the other hand, when a writ of right was by the form of counting turned into a writ of entry, and the tenant put himself upon a *jurata*, the essoin *de malo lecti* would not be allowed; the same, if in a writ of right the counting was of an inheritance descending from a common stock to co-heirs, for this could not be determined by the duel or great assize. For the same reason it was not allowed in a writ of right of dower; it being laid down as a general rule by Bracton, that where the duel or great assize might follow, and as long as the duel or great assize might be had, there, and so long

<sup>1</sup> Bract. 344.

this essoin would lie, and that where and when either of those trials could not be had, it did not lie.<sup>1</sup>

This seems to be a better rule than to say that the essoin *de malo lecti* lay in all writs of *precepe*; for though it did lay in writs of right as long as they retained their primary nature, yet, as this might be changed by the form of counting, it became a less certain rule than the other. However, by one or other of these rules it might easily be pronounced whether both the essoins *de malo veniendi* and *de malo lecti* lay, and where only the former.<sup>2</sup>

The essoin *de malo lecti* would not lie, even in the actions before mentioned, for any of the following persons. Thus, it would not lie for a demandant, though he might have that *de malo veniendi*, but his pledges would be exacted if he made default in appearing; nor for an attorney, though, if an attorney was *longiquus*, this was such an insurmountable impediment, that it would, from necessity, be admitted as an excuse, but not till the fourth day. It would not lie for a warrantor till he had entered into the warranty; because then he might put himself on the duel or great assize. It would not lie before the *justitarii itinerantes*, for a person residing in the same county, because he might appoint an attorney;<sup>3</sup> nor, for the same reason, where the tenant lived in London.<sup>4</sup> Nor would it lie where it was not preceded mediately or immediately by the essoin *de malo veniendi*, but an essoin *de malo lecti*, so cast, would be turned into that *de malo veniendi*, and would operate only as such.<sup>5</sup>

This essoin ought to be made on the third day inclusively before the day given by the essoniator in the essoin *de malo veniendi*, and it ought to be cast by two persons, who were called, not essoniators, but *nuntii*, messengers; because they were sent to make an excuse, says Bracton, and not to essoin; for they received no day, nor did they swear to have a warrantor at a certain day to prove the essoin. This distinction between an *essoniator* and *nuntius* was very material, and was known in other instances than this of the essoin *de malo lecti*. An essoniator must come from the party; a *nuntius* might come either from the party or of his own head, to inform the court of any impediment that prevented the party's attendance, and he would be heard so late as the fourth day, or later, down to the time of judgment on the default.<sup>6</sup> It was by a *nuntius* as well as by an essoniator, that many of the before-mentioned excuses for non-appearance used to be made.

When, therefore, the *nuntius* had delivered the excuse, the demandant had a writ *de faciendo videre*,<sup>7</sup> directed to the sheriff, to this effect:—*Mitte quatuor legales milites de comitatu tuo apud villam, &c., ad videndum utrum infirmitas, quod A. in curiâ nostrâ coram justitiariis nostris apud W. essoniavit se de malo lecti versus N. de placito terræ, sit languor vel non. Et si sit languor, tunc*

<sup>1</sup> Bract. 344 b.<sup>5</sup> *Ibid.*<sup>2</sup> *Ibid.* 346 b., 347.<sup>6</sup> *Ibid.* 345.<sup>3</sup> *Ibid.* 349 b.<sup>7</sup> *Ibid.* 351.<sup>4</sup> *Ibid.* 350.



*ponant ei diem à die visus sui in unum annum et unum diem apud Turrim Londini, quòd tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et si non sit languor, tunc ponat ei diem coram justitiariis nostris apud W., &c., quòd tunc sit ibi responsurus, vel sufficientem pro se mittat responsalem. Et dic quatuor militibus illis quòd sint coram iisdem justitiariis, &c., ad terminum predictum, ad testificandum visum suum, et quem diem ei posuerunt; et habeas ibi nomina militum, &c.*<sup>1</sup> This writ was to be faithfully and literally executed by the sheriff, and needs no other observation except in that passage where a day is given at the Tower. Bracton says, this was done because the constable was always present there to receive the appearance of parties, who perhaps had a day to appear, when no justices were sitting on the bench at Westminster. However, if it happened that the justices were sitting, the party was still to keep his day before the constable; and the constable would give him a day, either before the justices of the bench, or, if the pleas were adjourned before the justices itinerant, then at the eyre.<sup>2</sup>

If the four knights, or any of them, failed to appear to make certificate of their view, process of attachment issued against them; for neither the view nor certificate thereof could be made by less than the four knights named; and therefore, if one of them died, a new writ issued for the sheriff to substitute another.<sup>3</sup>

It was a rule, that after the *essoìn de malo lecti* was received, the party should not *surgere*, as it was called, that is, not stir abroad, much less appear in court, without having *licentia surgendi*. This licence was to be obtained by sending some person to inform the justices that the party *essoined* had recovered his health. The strictness with which the person *essoined* was to observe the *essoìn* as well before view as after judgment of *languor* was pronounced, is very singular. Bracton declares, that *decinctus, et sine braccis, et discalceatus se tenere debet in lecto*; yet he adds, *alicubi poterit indui vestimentis si voluerit*: however, if he went out of his chamber, he was not to go out of his house, under pain, if found abroad, of being arrested by the demandant, and of losing his land as a defaulter in breaking his *essoìn*. Such arrest, indeed, ought properly to be made by the coroners or some officer of the king's court. When the officer came with sufficient testimony of other good and lawful men to prove that he had broken his *essoìn*, the party might endeavour to prove the contrary; he might say, *quòd cum esset tali die apud talem locum et in lecto, sicut ille cui languor adjudicatus, et in pace domini regis, venit ibi ipse talis petens, et nequiter, et in FELONIA extraxit eum à domo sua, et à lecto suo, et in roberia abstulit ei tantum, contra pacem domini regis; et sic offert, &c.* Upon this, a proceeding would commence, as in an appeal, and the matter would be determined by the duel, or inquisition; and according to the event of this trial, one of the parties would lose for ever; the tenant, *quia stultè surrexerit*; the demandant, because

<sup>1</sup> Bract. 352 b.<sup>2</sup> *Ibid.* 353.<sup>3</sup> *Ibid.* 354.

he maliciously drew the party essoined from his house; and as he meant to gain something by that proceeding, it was but reasonable, says Bracton, that he should likewise be a loser. If the tenant was arrested in a manifest act of breaking his essoin, the demandant might tacitly waive the default in this, as in other cases, by doing some act which showed he did not mean to proceed on the default, as taking a day, *prece partium*, or the like.<sup>1</sup>

Although before the view the party essoined might obtain *licentia surgendi*, yet afterwards, and when *langnor* had been adjudged, he would be obliged to confine himself in the way above mentioned, without any *licentia surgendi*, the justices having no jurisdiction to grant it; for the day now stood before the constable whose duty it was to remit the plea to the justices.<sup>2</sup> At the end of a year and a day, the party was to appear in person, or, if unable, he was to send a *responsalis*: no essoin could now be had, that *de malo lecti* being the last. If he was still unable to appear, there only remained for the justices to adjudge it *morbus soniticus*. Whatever was done, the constable was to make a record thereof, and transmit it to the justices, and give a day before them *in bonco*. Thus ended the authority of the constable. If this essoin was made not in the king's but the sheriff's court, then, instead of the Tower of London, some castle, or other certain place within the county, was appointed for the appearance at the end of a year and a day.<sup>3</sup> If the party did not keep the day appointed by the four knights, his land was taken by *parvum cape*, the same as if he had actually appeared, because the return of the knights was as a record which the party essoined was not permitted to deny.

There was another essoin, which was considered as anomalous, and not at all within the course and rule by which other essoins were governed. This was the essoin *de malo villæ*; which was when the party had appeared, but was afterwards, before any answer to the suit, taken ill in the town where the court sat, and was unable to attend. This, like the essoin *de malo lecti*, was signified, not by an essoniator but a *nuntius*. The party was to send two different *nuntii* every day, for four days; on the fourth day the justices were to send four knights to the sick person, to accept an attorney from him, and if he was not to be found, he would be in default. This essoin *de malo villæ* did not lie in the county court, nor before the justices assigned to take any assize, or jury, nor in any case where the party was not to be expected till the fourth day.<sup>4</sup>(a)

(a) The subject is treated more fully in the *Mirror* in several chapters. First, of defaults in personal actions: the defendants were distrained to the value of the demand, and afterwards they were to bear judgments for their defaults, and for default after default, judgment was given for the plaintiff. The usage was changed in the time of king Henry I., that no freeman was to be distrained by his body for an action personal so long as he had lands, in which case the judgment by default was of force, until the reign of Henry III., that the plaintiff should recover his tenure of land, to

<sup>1</sup> Bract. 358.<sup>2</sup> *Ibid.* 358 b.<sup>3</sup> *Ibid.* 363.<sup>4</sup> *Ibid.*

We have seen what was the method of casting an essoin in order to save a default on the return of the writ of summons. We now

come to speak more particularly of *defaults*, and their consequences. This, like most other subjects, is handled very fully by Bracton, with whose assistance we may attain a complete idea of this part of our ancient judicial proceedings.<sup>1</sup>

If the tenant sent no essoin, nor appeared the first day, nor the second, third, nor fourth; then, provided the demandant *obtulit se* on either of those days before the fourth, the land would be taken into the king's hands; which caption was not followed by any severe penalty: for if the tenant appeared within fifteen days after the caption, and demanded the land in court *per plevinam*, and if at the day given, he could do away the default, the possession would be restored, or, as Bracton calls it, *reformed*. It seems, that if the tenant failed to appear the first day, and the demandant did appear; then, notwithstanding the tenant appeared the day after, if he could not save his default, he would lose his seisin. If neither appeared the first day, and both on the second, one default was set against the other, and no advantage could be taken by the demandant; and so of the other days down to the fourth: the same, if the demandant appeared the first day, and the tenant not, and the tenant the second, but the demandant not. If they both appeared on the third, one default was set against the other.<sup>2</sup>

During the four days, the demandant and tenant were allowed to show excuses for their non-appearance; and the tenant might excuse himself even after the four days, if the ground of his excuse was such an impediment as really prevented his appearing, and he had sent a messenger to notify it within the four days. The grounds of excuse which the court would allow, were such as the following: He might say that he was put under restraint or imprisonment (provided it was not on account of any crime); that he fell among robbers, who bound and detained him, so as to prevent his sending a messenger; that he was stopped by flood, snow, frost, or tempest, by a broken bridge, or the loss of a boat, if there was no other safe passage.

If within the fourth day he neither came, nor sent some such excuse for not coming, the following entry was made: *A. obtulit se quarto die versus B. de placito quòd reddat ei tantum terræ, &c. Et B. non venit. Et summoveas, &c. Judicium, &c.*, that the

hold the same after default, until due satisfaction was made. In personal actions, however, in which the defendants were not freeholders, they used to be punished in this manner: First, process was to be awarded to arrest their bodies, and those who were not found were outlawed. Then, as to defaults in real actions, they were punishable thus: at the first default, the plaintiff was seized to the value of the demand, or, after appearance, the seizure was to be adjudged to the plaintiff to hold in the manner of a distress; and if any one appear in court, he was to answer to the default, which he might do by denying the summons, because he was never summoned, or not reasonably summoned. In mixed actions, the parties were distrained by their goods and lands until they answered.

<sup>1</sup> *Vide ante*, 114.

<sup>2</sup> Bract. 364 b.

land should be taken into the king's hands; upon which there issued the writ of *magnum cape*, as it was called, to this effect: *Cape in manum nostram per visum legalium hominum, &c., quam A. in curia, &c., clamat ut jus suum versus talem pro defectu ipsius B. Et diem captionis scire facias justitiariis, &c. Et summoncas, &c., predictum B. quod sit coram visdem, justitiariis, &c., inde responsurus et ostensurus quare non fuit coram iisdem justitiariis, &c., sicut summonitus fuit; or, as the case might be, quare non obsecravit diem sibi datum per essoniatorem,<sup>1</sup> &c.*

The writ of *magnum cape* was the process in all defaults before appearance in court; or, what amounted to the same thing, before the appointment of an attorney.

The day of the caption ought to be indorsed, in order to show the time of fifteen days, within which the land might be demanded by plevin. The demand of plevin was to be entered upon the roll in this manner: *Talis petit per talem tali die terram suam per plevinam, que capta fuit in manum domini regis, per defectum quam fecit versus talem, coram justitiariis nostris, tali die.* Upon this no writ issued, nor was anything done, except directing the party to keep the day given him in the writ of caption. If this plevin, and acceptance of the day, was done by the tenant himself, it seemed to preclude him from denying any summons on the caption; if by attorney, it was still left open to him to deny both the first and second summons. The effect of the caption was not to deprive the tenant of the occupation and use of the land; for if so, it would be rather, says Bracton, a disseisin than a distress: should, therefore, a church become vacant in the meantime, the presentation belonged to the tenant.

After this demand *per plevinam*, the land was not immediately replevied to the tenant before he appeared, but it was first seen whether the demandant would proceed on the cause of action, or on the default: if the former, it was a relinquishment of the default, which immediately became null, and the land was replevied;<sup>2</sup> if the latter, it was not replevied till he had saved his default: in which if he failed, the seisin was adjudged to the demandant.

Upon the summons in the *magnum cape* the tenant was allowed no essoin, nor had he the *dies rationalis*, as it was called, that is, the indulgence of fifteen days; because, being in contempt, he deserved, according to Bracton, no more favour than in case of a disseisin. The summoners were to come, if necessary, to testify the summons. At the return of the *magnum cape*, if the tenant appeared, and the demandant made choice of proceeding on the default, the tenant might deny the summons (and sometimes the essoins *de malo veniendi* and *de malo lecti*, if any); and if the summons was testified by the summoners on examination, he must wage his law thereof; and upon that another day would be given to make his law, and pledges likewise must be found. Upon the day ap-

<sup>1</sup> Bract. 365.<sup>2</sup> *Ibid.* 365 b.

pointed for making his law, an essoin lay for both parties.<sup>1</sup> If at length he made his law, he saved the default, but was obliged the same day to answer to the action, that no further delay might be had to the interval between waging and making law. If he failed in making his law, he lost, and the demandant recovered seisin of the land: further, the tenant, and, according to Bracton, the pledges likewise, were to be *in misericordia*.

If the tenant did not appear to the *magnum cape* on the first day, but on the second, third, or fourth, and the demandant came the first day and demanded judgment of both defaults, the tenant was required to defend both: unless he had precluded himself, with respect to the latter, by demanding plevin in person, as before mentioned; for if both were not removed, he would continue in default. Should the default not be saved in some of the aforesaid ways, judgment would be given for the demandant to recover seisin of the land taken by the *magnum cape*; <sup>2</sup> upon which a writ of *seisinam habere facias* would issue to this effect: *Scias quod A. in curia, &c., per considerationem curie recuperavit seisinam de tantâ terrâ, &c., ut de jure suo, versus B. per defaultum ipsius B. Ideo tibi præcipimus quod ipsi A. de prædictâ terrâ sine dilacione plenariam seisinam habere facias, &c.*

When the tenant had lost in this manner by default, there still remained a remedy for him; for he might recover in a writ of right at any time till the duel was waged, or the tenant had put himself on the great assize. Some thought it was open to him till the four knights were summoned; others, till the twelve were elected; but it was agreed, that no recovery could be had of land taken for default, after the twelve were elected. The tenant had a remedy likewise, if there had been any fraudulent contrivance in the demandant to prevent his being summoned; for when this was discovered, there would be neither a caption, nor judgment for a default; and if judgment was given, and anything done thereon, it should be revoked. The tenant might recover likewise, if judgment of seisin had passed while he was abroad, and he had not been prevented, as before mentioned, by the service of a summons. Bracton asks by what writ he should proceed in this last case; for neither the justices nor demandant had been guilty of any irregularity, as the summoners testified the summons to have been lawfully made. And he thought that the tenant might proceed by assize of novel disseisin; for he was in effect unjustly disseised, though by a judgment in court: and the demandant, says Bracton, in his answer to the assize,<sup>3</sup> might call upon the king's court to warrant him; and then the court, which had been so deceived, would revoke and vacate the process and judgment.

As the judgment of seisin might be vacated and revoked, so might the default be saved before such judgment was passed; and this in various ways.

<sup>1</sup> Bract. 366.<sup>2</sup> *Ibid.* 366 b.<sup>3</sup> *Ibid.* 367.

The principal of these was, the excuse which was before mentioned when we were speaking of essoins, namely, a warrant *Warrant de* that he was in the king's service. This was signified *servitio regis.* by a writ to this effect. After reciting that he was in the king's service, it went on: *Idco vobis mandamus, quod propter absentiam suam ad diem illum coram vobis non ponatur in defaultam, nec in aliquo sit perdens, quia diem illum ei warrantizamus.* A person might be protected by such a writ, *de servitio regis* for a certain term, as from such a day to such a day; and they used to be obtained not only to save defaults in particular actions, but to save the default of appearance on any general summons, as that to appear before the justices at their eyre. As the king's service was a sufficient warrant to dispense with attendance in court; so was the being party to a suit in the superior court a sufficient excuse for not appearing in the county, court-baron, or other inferior court, and a writ used to issue to warrant him in such absence.<sup>1</sup> The justices of the bench might send a writ to the justices itinerant, informing them that a party was attendant before them, and this would excuse his appearance in the eyre. The warrant *de servitio regis* could never be applied so as to enable the party making default to gain anything, but merely to indemnify him for a loss; nor could it suspend a judgment in any matter *contra pacem regis*, as outlawry or the like. The other grounds upon which a tenant might get the judgment and execution revoked and vacated, were such as have been before stated as sufficient to save the default before judgment; such as imprisonment, being abroad before the summons, and other matters, which showed the absence to be not voluntary, but of necessity.

The warrant *de servitio regis* was liable to be controverted. It might be shown, that the party was at another place than that stated in the warrant; or, perhaps, even in court, but declining to enter an appearance at the time he was supposed by the writ to be *in servitio regis*. Bracton is of opinion, that such matter might be objected against the writ; though he admits, as on a former occasion, that if a representation was made to the king, and he persisted in continuing the warrant *de servitio*, there was no remedy.<sup>2</sup>

Before judgment of seisin, a default might be done away by certain acts of the demandant which were construed as an applied renunciation of the fault; as if he accepted a *dies amoris*, or removed the plea, or cast an esoin. When therefore he took a *dies amoris*, it was usually accompanied with a protestation, *quod si amor se non capiat, salvus sit ei regressus ad defaultam.* A default might be released, either by a principal, an attorney, or a warrantor.<sup>3</sup>

Thus far of defaults committed by the tenant. The law was nearly the same as to the demandant. Thus, if he made default and the tenant appeared, and the writ came, notwithstanding the

<sup>1</sup> Bract. 367 b.<sup>2</sup> *Ibid.* 368. *Vide ante*, 405.<sup>3</sup> Bract. 369.

demandant might offer himself at the fourth day, the tenant would go quit, and the demandant would be *in misericordia*. The demandant had the same excuses, which we have just shown the tenant to have, to save his default. If neither the demandant nor writ came at the first day, and the tenant had essoined himself, then,<sup>1</sup> although there was no authority for proceeding, yet Bracton says, he should not be entirely absolved, but *dicatur ei quòd eat sicut venit*: the same, if the demandant came, and neither the writ nor tenant. But if the demandant and tenant both came, or either had essoined himself, and the writ did not come, yet still *alius dies* should be given the parties, and the demandant, or his essoniator, would be commanded to cause the writ to be returned, as would likewise the sheriff. Again, if both parties were present, and the writ not returned, the tenant might demand the judgment of the court, whether he ought to answer without a writ; and then he would have judgment, *quòd quietus recedat de brevi illo*.

If the writ was against more than one tenant, and one appeared, one cast an essoin, and one made default, *alius dies* would be given to the two former; but the other was to be proceeded against by *cape*, taking, if he was one of several parceners, only his portion of the land. If the same default happened where the demandants were parceners, then a writ would issue against the defaulter, summoning him *ad sequendum cum B. et C. participibus suis in placito quod est inter A. B. C. petentes et D. &c., et unde idem D. dicit quòd non vult iisdem B. et C. respondere sine predicto A. &c.* If the defaulter did not appear at the return of this writ, nevertheless *B. and C.* might proceed, as for their part, if they pleased.<sup>2</sup> If husband and wife were demandants, or tenants, they were not considered as *participes*, but the same person; and the default of one, was the same as the default of both. If they were tenants, and the wife said her husband was dead, the judgment of seisin would be suspended, though she had no proof or *secta* to establish the fact; and a day would be given for the wife to prove the death, and the demandant the life; and it seems from Bracton, the mere dictum of the wife was, in this case, held sufficient to throw the *onus probandi* on the demandant.

We have before said, that upon a default, the caption of the land, or other thing in question, was either by *magnum cape* *Parvum cape.* or *parvum cape*. It will be proper to examine more particularly, when the one and when the other was the proper remedy, Bracton lays it down as a general rule, that in all cases where a person might deny a summons *per legem* (which he might before appearance), whether in the king's court, in the county, or court baron, there the caption should be by the *magnum cape*: the same, where on default to a writ of *pone* for removing a plea from the county to the king's court, though the tenant had in the county put himself on the great assise,<sup>3</sup> and the four knights had been

<sup>1</sup> Bract. 369 b.<sup>2</sup> *Ibid.* 370.<sup>3</sup> *Ibid.* 370 b.



summoned, if the tenant made default to the writ of *pone*: so upon a removal from the court baron to the county, on account of the lord having *de recto defecisse*: so when all the pleas *in banco* were put *sine die*, on account of the *iter justitiariorum*, and were again re-summoned: and so in all cases of re-summons, except in the re-summons after a determination of bastardy in the ecclesiastical court, where the process was *parvum cape*: because there remained nothing further but judgment to be passed, which was not the case in the former instances, in all which the party might wage his law of non-summons.

If a person had once appeared in court, and had another day, so as that he could not deny the day and summons *per legem*, or if he had done anything that furnished a presumption of his having been summoned, as making an attorney; in short, Bracton lays it down generally, that where a person had once appeared in court, and then made default, the caption should be by *parvum cape*.<sup>1</sup> The distinction when the one or other of these writs should be used, seems very extraordinary, as there is no difference in the forms given by Bracton; nor does there seem to be any in the effect. Indeed, the latter is spoken of very slightly by that writer: he barely says, if the party did not come on the first day of the summons, on the *parvum cape*, he should be expected till the fourth; and on the fourth, the seisin should be adjudged to the demandant; and the tenant should have such recovery *quale habere debuit*; as if he might recover in the same manner, as had been before mentioned in case of a *magnum cape*.<sup>2</sup> The whole of the learning which we have just been delivering respecting the *magnum cape* seems to have been equally applicable to the *parvum cape*.

We have been speaking of the process by caption, as the regular process in actions real: it was likewise used in some mixed actions; which were both *in rem* and *in personam*; where each party might be said to be *actor* and *reus*, though, in form of law, he alone was *actor* who brought the writ; as where the inheritance was divisible, either *ratione rei*, or *ratione personarum*, and one *particeps* brought a writ against another *pro rationabili parte*: so where land was *in communi* to persons who were not co-heirs, and one brought a writ for a division: so where a contest arose between neighbours for a boundary, and one brought a writ against the others *pro rationabilibus divisis*. For if in either of these three actions, or in any similar to them, a default happened, the process was the same as in real actions. But where two actions were contained in one writ, one being *in personam*, the other *in rem*; as where a person was summoned to show *quo warranto* he held such land, and then the writ went on and said, *Quam dominus rex clamat esse eschatum suam*; in this case, as there would arise an appearance of claim to two sorts of process, Bracton thought, contrary to the opinion of some others, he should have that which carried most compulsion, namely, the

<sup>1</sup> Bract. 371.<sup>2</sup> *Ibid.* 371 b.



process real by caption. Sometimes these two matters used to be separated; and then upon the writ which contained the *quo warranto*, or *quo jure*, the process was attachment, and not caption of the land.<sup>1</sup>

It may be here remarked, that by this simple writ of *quo warranto*, or *quo jure*, nothing could be recovered; for <sup>Writ of quo jure.</sup> it was merely to call upon the tenant to show by what title or warrant he held; and if he held by none at all, yet this gave no title to the demandant; but the demandant having made this discovery, must resort to another writ if he would recover the land.<sup>2</sup> This writ of *quo warranto*, or *quo jure*, by which a man might be called upon to show his title, enabled a litigious person to disturb the peace of any man's estate whenever he pleased. How far the party, so called upon, was required to disclose his title, does not appear. Bracton seems to speak as if it went no further than the title to possession, and the general point, whether by descent or purchase; and he seems to consider it as an ungracious and unhandsome proceeding. From the instance given by Bracton, it may be collected that this writ of discovery lay only for the king.<sup>3</sup> (a)

After the essoins, and other delay, or at the first day of the summons, in the writ of right, if the parties both appeared, the demandant was to propound his *intentio*,<sup>4</sup> as The count. it was called by Bracton, or *count*, and show the form in which he meant to contest his claim. For this purpose, after the writ was read, the demandant or his advocate, in the presence of the justices on the bench, was to declare himself to this effect: *Hoc ostendit vobis A. quòd B. injustè ei deforceat tantum terræ cum pertinentiis in tali villâ, et ideo injustè quòd quidam antecessor suus nomine C. fuit inde vestitus et seistitus in dominico suo, ut de fædo et in jure, tempore Henrici REGIS AVI DOMINI REGIS [or TEMPORE REGIS Ricardi avunculi domini REGIS, or TEMPORE JOHANNIS REGIS PATRIS domini REGIS, or TEMPORE HENRICI regis qui nunc est] capiendo inde expletia ad valentiam quinque solidorum, sicut in bladis, pratis, redditibus et aliis exitibus terræ; et de prædicto C. descendit jus TERRÆ ILLIUS, or as some expressed it DESCENDERE DEBUIT cuidam D. ut filio et hæredi, et de prædicto D. cuidum E. ut filio et hæredi, et de prædicto E. isti A. qui nunc petit, ut filio et hæredi. Et quòd tale sit*

(a) This is very remarkable. It was a proceeding in substance by way of discovery, or interrogatory, to ascertain the nature of the right on which the party relied, and that party in possession. Bracton, however, says: "Sed tamen quamvis incivile sit cogi possessorem titulum suæ possessionis dicere per breve quo jure tamen valet ad hoc, ut petens scire possit utrum tenens teneat pro hærede vel pro possessore: et pro hoc qua actione debet experiri, pro hærede autem possidet qui putat se hæredem esse: pro possessore vero qui nullo jure rem hæreditariam vel totam hæreditatem sciens ad se non pertinere possidet" (lib. v. fol. 373). So that it went only to the general nature of the tenant's title, whether he relied on title or possession, and if title, as heir or otherwise, it did not go into the particulars of his title.

<sup>1</sup> Bract. 372.

<sup>2</sup> *Ibid.* 372 b.

<sup>3</sup> *Ibid.*

<sup>4</sup> Bracton here borrows a term from the canon law, as Glanville did the term *petitio* from the civil, to signify the count.

*jus suum, offert disrationare per corpus talis liberi hominis sui, vel alio modo, sicut curia consideraverit.*

Certain parts of the *count* are worthy observation. Thus, we see, it was not sufficient barely to say, *peto tantam terram ut jus meum*, but this claim was to be grounded upon some suggestion that would demonstrate it, and show in what manner and by what degrees the *jus* ought to descend to the demandant. Again, as the object of a writ of right was to recover as well the *jus possessionis* as the *jus proprietatis*, upon the seisin of a certain ancestor, it was not enough to say that such ancestor was seised *in dominio suo, ut de libero tenemento*, only, but that he was seised *in dominio suo, ut de feodo*, which included in it the *liberum tenementum*, and whole *jus possessionis*: nor was it enough to say that he was seised *in dominio suo, ut de feodo*, without adding *et jure*, which included in it the *jus proprietatis*. Nor would the concurrence of these two rights, those of possession and propriety, called *droit droit*, suffice, unless the ancestor named held the land *in dominio suo*; for if<sup>1</sup> it was *in servitio* only, he would fail, the writ of right being for a recovery *in dominio*; for the demandant counted on the seisin of the ancestor; and therefore the same seisin must be recovered which the ancestor had. Again, it was not sufficient that the ancestor was seised *in dominio suo, ut de feodo et jure*, unless he added, that *expletia cepit*. For though a person may have a *liberum tenementum* and *feodum* without the *expletia* in a possessory action, as was before shown in the assize of novel disseisin and mortmain-cestor; yet the seisin of the *proprietus* was required not to be so momentary, but that there should be time to take the *expletia*; and therefore it was held, if there was no mention of *expletia*, the action would abate. Thus, if in fact no *expletia* were taken, and the party had suffered the time of bringing an assize of novel disseisin or mortmain-cestor to pass, and brought his writ of right, he would have no recovery.

Again, it was required that a certain time should be mentioned, that is, the time of some king, *us tempore talis regis*; for a writ of right, like other writs, had a time of limitation. Thus in the time of Glanville<sup>2</sup> it was not to exceed the time of Henry I., and now, by a late statute, it was not to exceed the time of Henry II., the present king's grandfather; the reason given for which was, that beyond that period no one could succeed in making a proof, whatsoever right he might have: for a demandant could not make proof, says Bracton, but *de visu proprio*, or that of his father, who enjoined him to testify the fact, if any contest should arise upon it: and if Bracton wrote towards the close of this reign, the above period of limitation was perhaps as far as this sort of proof could well reach. When, therefore, a demandant mentioned the time of Henry I., he would fail, for want of proof.

If his ancestor happened not to be seised in the time of the king

<sup>1</sup> Bract. 372 b.

*Vide ante*, 264.

mentioned in the writ, although he was seised in another king's reign, yet the demandant might perhaps fail through <sup>Tender of the</sup> *demimark* this error, the same as if he had never been seised at all. But the issue to be tried by the great assize being, which of the parties had most right; the king's time did not properly come within the consideration of the recognitors; and the right between the parties might be decided with justice in favour of the demandant, although he had failed in the time of seisin mentioned in his count: when, therefore, the demandant had put himself on the great assize, and the tenant had suspicion that the ancestor was not really seised at the time mentioned in the count; as perhaps he was not born, or was dead at the time; he used to pray that the time of seisin might be inquired of by the recognitors: and to obtain the favour of this extraordinary inquiry, it was the practice for the tenant to give something, *dare de suo*, as Bracton calls it: this being, probably, a remnant of the old custom of putting justice to sale; an abuse which was long permitted and made a gain of by our kings, and was at last provided against by a clause in the famous chapter of the Great Charter.<sup>1</sup> To prevent the tenant taking advantage of an error in mentioning the time, the demandant was permitted to correct it, and speak of the time of another king; and this was allowed in any state of the cause till the tenant had answered, and put himself on the great assize, or defended himself by duel; but not afterwards could the question of time be moved by the tenant.<sup>2</sup> The seisin was required to be *tempore pacis*; because, during wars, like those in the time of king John and the present king, many persons were violently disseised, and afterwards, in time of peace, were restored to their own property.

When the count was thus founded, the demandant was to offer to prove it, as was before mentioned; which offer was sometimes stated more fully: *Offert disrationare per corpus talis liberi hominis sui, et talis nomine, qui hoc paratus est disrationare per corpus suum, sicut ille qui hoc vidit, or de visu patris sui cui pater suus cum esset agens in extremis injunxit in fide quod filius patri tenebatur, quoddam si inde loqui audiret (as before mentioned) quoddam inde testis esset; et hoc per corpus suum disrationare sicut illud quod*

<sup>1</sup> *Vide ante*, 249. It is to be lamented that our author, who has opened to the modern reader so many secrets of our old jurisprudence, should be less explicit on a point that has caused much difficulty amongst lawyers. The tender of the *demimark*, as it was afterwards called, is the practice here noticed; but this is done so shortly as to throw no light upon it; and, unhappily, the passage is so obscured by the use of a word, and that a technical one, in two senses, that it is difficult to make out any meaning at all. Having used the word *mentio* to express the naming of the time of the seisin in the writ, he afterwards uses it to signify the moving the question of seisin by the tenant: *Dat aliquando tenens de suo pro habenda mentione de tempore*. Perhaps some reason might be given in those times, to show that the king might accept this tender of money for a judicial grace, without violating Magna Charta. This perhaps might be thought to stand on the same footing with the king's silver, which is still given *pro licentia concordandi*. The truth is, that the charter only aimed at flagrant and enormous partiality when obtained by corruption, and not at such trifling payments as were made and accepted of course from every body, as a moderate recompense to the officers of the court for their labour and attendance.

<sup>2</sup> *B. ct.* 373.

*pater suus vidit et audivit.* If any of the above circumstances were omitted, and the proceeding had gone too far to correct the error, the demandant would lose his claim for him and his heirs for ever.

Another material part of the count was the deducing the descent from the ancestor seized down to the demandant. This was plain and easy, when the descent was in the right line; but when it was necessary to go over to the transverse, or collateral line, it became more difficult: then, instead of deducing it from father to son, a transition must be made in this way: *Et quia idem talis obiit sine hærede de se, revertebatur jus terræ illius tali ut avunculo et hæredi,* &c. And in this it was necessary to observe, that the *stipes* resorted to did not exceed the time of limitation before mentioned. If a son died in the lifetime of his father, it was the opinion of some that he need not be mentioned in the descent; but Bracton does not assent to this, laying it down as a reason, that no right descended to an heir from an ancestor, unless by the death of some heir; and he thought that such deceased heir should be noticed in this way: *Quòd de tali antecessore descendere debuit jus tali ut filio et hæredi, et de tali ei qui nunc petit<sup>1</sup> ut nepoti et hæredi;* so that no chasm would be left in the descent: for if that was allowed, then a son might be attainted of felony in his father's life, and, being left out of the computation of descent, the grandchildren would succeed immediately; which, as Bracton says, would be inconvenient, and against law. However, when the eldest son died in the life of his father, leaving no children, but leaving brothers, then it was not necessary to mention such eldest son in the computation of the descent, though the right ought to descend to him; as well because the other brothers were as near in degree to the seisin of the father as the brother who died, as because, upon his death, the eldest of the surviving brothers became next heir to the father; on which account the attainder of such elder brother, in the lifetime of the father, would not affect the other brothers, who were not heirs to him during the father's life.

Where an abbot, prior, or other incorporated person, sued a writ of right, in right of his church, grounded upon the seisin of a predecessor, there was no need to count from one abbot to another, naming the intermediate ones; because the corporation remained the same, notwithstanding the changes of the abbots.<sup>2</sup> They therefore only said, *talis abbas, predecessor suus, fuit seisitus,* &c. If land was given to more than one jointly, the parties should all be named in the computation of the descent, thus: *Et unde A. B. C. D. fuerunt seisiti, &c., et ita quòd tales mortui fuerunt sine hærede de se, accreverunt eorum partes superstitibus, et ita quòd jus terræ illius descendit hæredibus eorum qui fuerunt superstites, scilicet talibus; et quia unus illorum, scilicet talis, obiit sine hærede de se descendit totum jus tali, et de tali illi qui nunc petit, &c.*

If any one was omitted in the descent; if it commenced with one

<sup>1</sup> Bract. 374.

<sup>2</sup> Ibid. 374 b. Vide ante, 397.

who never was in seisin ; if there was any error in the person, or the name of any one mentioned in the descent ; if any of those mentioned in the descent was a villein ; in all these cases, the action would abate, and the demandant lose his suit.<sup>1</sup>

When the count was thus exhibited, it became the tenant to consider what defence he could make. The first point Defence. to be considered was, whether the court had jurisdiction of the cause ; next, whether the parties to the writ were proper ; and then, whether the writ was liable to any exception. The next consideration was, whether the tenant held all the land demanded, or only part, and how much : to ascertain this, the tenant might pray *a view*. When this was over, then the tenant was to answer to the merits of the cause, either by himself or attorney, unless there was some *warrantor* whom he should like to *vouch*. The nature of vouching to warranty, and the answers the tenant might make, we shall defer for the present, till we have inquired a little into the method of praying and making *a view*, and the cases in which it was allowed.<sup>2</sup>

A view might be had either by the party or by the jurors. Of granting a Of granting a view. the latter, something has already been said in the assize of novel disseisin. A view might be had also sometimes in inquisitions ; and not only where it was a question for the recovery of property, but also where it was entirely upon a fact, as in cases of trespass. What we have now to say, will be confined to *a view* when prayed by the party, and granted for the purpose of enabling the court to pass a certain and precise judgment on the matter before them. In order to understand this, we shall first speak of cases where *a view* was not allowed, then of those where it was, and, lastly, of the manner of making it.

In a plea *de proparte sororum*, if the demand of the *rationabilis pars* was by a writ of *nuper obiit*, that is, by stating that the demand was of a certain portion of the inheritance, of which their common ancestor *lately died seised*, the latter part of the allegation was construed to specify the parcel of land so accurately, as to supersede the necessity of *a view* ;<sup>3</sup> but if land was demanded by a writ of right *ut de proparte*, then *a view* was allowed. For the same reason *a view* was denied in dower, if brought for land of which the husband *obiit nuper seiscitus*. If a manor was demanded without the *pertinentia*, no view was allowed, a manor being sufficiently defined by the name only : so if the demand was of the moiety of a manor undivided ; because the demandant being ignorant which moiety belonged to the tenant, could not inform him of the particulars on taking the view. But if it was divided, and the *pertinentia* were claimed, there a view would be granted ; and, in any case, if the manor was undivided, he might have a view of the whole. A view was denied to an *intrudor*, if the thing in which the intrusion was made was specified without the *pertinentia* ; or

<sup>1</sup> Bract. 375.<sup>2</sup> *Ibid.* 376.<sup>3</sup> *Ibid.* 376 b.

if that was done, which was held to supersede the need of a view, as before mentioned, especially if the intrusion was so recent as within a year or less. If a woman demanded dower of a manor, of which she was specially endowed, without naming the *pertinentia*, she could not have dower; so if she demanded *tertium partem*, although she could not ascertain her third part, yet in this latter case, the tenant might have a view of the whole: however, if the woman replied that she demanded the third of that of which her husband *nuper obiit seiscitus*, and that the tenant held the whole, no view would be allowed, for the reason above given. If the demand was made in an uncertain way, no view would be allowed, as demanding all the lands holden by the tenant in such a vill over and above ten acres:<sup>1</sup> though here, as in a former case, he might have a view of the whole. When a tenant had had a view, no warrantor whom he introduced into the action could have it; the warrantor knowing by his charter what land he was to warrant, without the assistance of a view.

If a view had been refused, or had not been prayed, yet when the duel was waged, and pledges given, the two champions might and ought to have a view, because, by law, they were to swear *de visu*: a day, therefore, used to be given them for that purpose. After land had been taken into the king's hands by default, it was not usual to allow a view, because the tenant, when he demanded it back *per plevinam*, must have ascertained it in the same manner as would be done by the demandant on a view, which, therefore, superseded the need of a view; however, for the same reason as was before given, the champions were to have a view after a default.

If the demand was made not of land, but of some right, as a right of advowson, of common, and the like, though these are invisible in themselves, yet as they are issuing out of land, the land to which they belonged might be ascertained either by view, or what amounted to a view. In cases of common it was sufficient if the place was viewed by the jurors; and so it was in trespass, and in waste; for in a personal action a view might not be prayed by the party.<sup>2</sup>

A view could be had in the following cases: of all lands demanded in a writ of right, or in any other writ in which the duel or the great assize might be had; in short, it lay wherever a corporeal thing was demanded that could not be otherwise ascertained, either directly by the naming of it without any *pertinentia*, or indirectly by a description, as in a *nuper obiit* before mentioned, or by specifications that were adequate; as, *quam talis warrantizavit: talis tenet in eisdem villis: talem que capta fuit in nannus domini regis: talem quam talis tibi tradidit talem, de qua disseisinam fecisti, talem quam tenes de dono talis*. It lay of incorporeal things, as in a writ of *quo warranto*, which writ, as has been before mentioned, was both *in rem* and *in personam*. It might be had of

<sup>1</sup> Bract. 377.<sup>2</sup> *Ibid.* 378.

land out of which a rent issued, to which any one had common of pasture, or in respect of which suit of court was demanded. In all these cases, as well as the former, it might be had, unless the necessity was superseded by some sort of designation or description that was equivalent to it.<sup>1</sup>

If the view was granted, the entry on the roll was to this effect: *A. petit versus B. tantam terram cum pertinentiis, &c. &c. Et B. venit, et petit visum de terrâ, unde, &c.* And then there issued a writ to this effect, directed to the sheriff: *Præcipimus tibi, quòd sine dilatione habere facias B. visum de tantâ terrâ cum pertinentiis in N. quem A. in curiâ nostrâ coram justitiariis nostris apud W. clamat, ut jus suum, versus prædictum B. Et die quatuor militibus, ex illis qui visui illi interfuerint, quòd sint coram iisdem justitiariis nostris apud Westmonasterium, tali die, &c., ad testificandum visum illum; et habeas ibi nomina militum, et hoc breve, &c.,* varying according to the form of the original writ,<sup>2</sup> and then *dies datus est eisdem, &c.* On the *dies datus*, the demandant and tenant might both cast essoins; but whether they came or not, the sheriff was to command the four knights to appear and testify their view; and when this was once done, the record of such testification must be abided by. If no view had been made, and the tenant appeared, and showed it, he might have another day. In making the view, the demandant ought to show to the tenant, in all ways possible, the thing in demand, with its metes and bounds.

If the tenant objected that the demandant had put in view more or less than what was contained in the writ, an inquisition of the country used to be made to find the truth.<sup>3</sup> This inquisition sometimes consisted of four, five, or six persons, whom the parties named, together with certain of those who had made the view. For this purpose the following special *venire facias* would issue: *Præcipimus quòd venire facias coram justitiariis nostris, &c., A. servientem talis, et ætornatum tuum, in loquellâ quæ est inter eundem A., &c., de tantâ terrâ, &c. Et similiter cum eo B. C. D. E. super quos prædicti tales se posuerant, et præterea quatuor ex illis qui visui interfuerint, quem prædictus A. attornatus petentis fecit tenenti de prato, &c., ad certificandum præfatis justitiariis quid et quantum prati, &c., idem attornatus posuit in visu, et unde idem tenens dicit quòd non posuit in visu, nisi tantum, &c.*

When the tenant was thus informed of the quantity of land which the demandant claimed, he was better able to calculate his defence, whether to take it on himself by pleading any exception, or, if he had any warranty, to vouch a warrantor to defend for him.<sup>4</sup>

If the tenant had no good cause of exception, either dilatory or peremptory, and had any one to vouch, it would be safer to vouch his warrantor to defend for him. This was to be done by the aid of the court, or not, according as the warrantor was, or was not, within the power of the tenant.<sup>5</sup> A

<sup>1</sup> Bract. 378 b.<sup>2</sup> *Ibid.* 379.<sup>3</sup> *Ibid.* 379 b.<sup>4</sup> *Ibid.* 380.<sup>5</sup> *Ibid.*

clause of warranty was usually inserted in every charter, whether made on the occasion of a donation, a sale, or exchange of any land or tenement; sometimes a warranty arose by reason of homage, without any charter at all. As a warranty was usually made for the warrantor and his heirs, to the donee and his heirs, the mutual tie continued on the heirs *in infinitum* on both sides; so it did on the assigns, and those who were *in loco hæredum*, as the chief lord, who came into seisin by reason of escheat.<sup>1</sup> A tenant for life, as well as one in fee, and even one who held for term of years, might either vouch or be vouched. A husband might vouch his wife; and, in case of a gift made by her to him before marriage, if he lost, she was bound *in excambium*: the same if the wife was impleaded of land given to her before marriage by the husband.<sup>2</sup>

If a minor was vouched, the tenant was expected, at the time of vouching, to show the deed containing the warranty. This was to take off the suspicion of its being meant for delay, the vouching of minors being often resorted to for no other purpose than that of delay. When the charter was shown, and the question was upon a service, it was inquired, whether the minor's father, or any of his ancestors, was seised of the service *anno et die quo fuit vivus et mortuus*: if he was, then the minor was immediately to enter into the warranty, but the plea between the demandant and him was to remain *sine die* till he was of age; for he was not obliged to answer, either to the warranty or the plea, till he was of age. But if the tenant had been enfeoffed of the land in question during the minority, the minor was to answer both to the warranty and the plea; and in order to know this, an inquisition would be made, whether it was an inheritance by descent or by purchase. What is said above of services applied also to homage.<sup>3</sup>

The obligation of warranty that arose from homage might, as was before said, be proved without a deed. If the Nature of  
vouchee called for one, the tenant need only say, "You warranty.  
are bound to warranty, because *ego sum inde homo tuus*, and you have received my homage for this land, and are in seisin of my service, and my father and his ancestors *inde fuerunt homines antecessorum tuorum*;" of which he was to produce a sufficient *secta*, or some one who was ready, if necessary, to prove it *per corpus suum*: and if, upon the denial of the vouchee, this was afterwards proved before the justices, they would adjudge him to enter into the warranty. Although the tenant might at any time make the surrender of his tenement, yet the lord could not waive the homage, because by such means he might, at the expense of a small service, deprive the tenant of the claim of warranty, which depended upon the doing of homage. If the warranty was grounded on a fine and cyrographum, it is made a doubt by Bracton, whether a minor should not be bound to answer, though his ancestor was not seised *die et anno*, as above mentioned. But of this more hereafter.

<sup>1</sup> Bract. 330 b.<sup>2</sup> *Ibid.* 381.<sup>3</sup> *Ibid.* 381 b.



A warranty was sometimes conceived so as to bind not only the person of the feoffor, but also a certain tenement. Thus in the deed of gift he might say, that he and his heirs would warrant the gift *ex tali tenemento quod tunc tenet*, to whomsoever that tenement might afterwards come; by virtue of which special warranty that tenement, in whatsoever hands, would be liable to go *in excambium* of the land warranted. But the law was so favourable to warranty, that, without such express specification, land was held to be tacitly bound by a warranty; and therefore, if a warrantor at the time of making his warranty<sup>1</sup> had sufficient to make good his warranty, the land he then had became bound by the warranty; and even if it went into the hands of the chief lord, or of the king, by escheat, Bracton holds<sup>2</sup> it to be liable to the warranty, *quia res cum onere transit ad quemcunque*.

The king, in point of law, was liable to warrant, the same as a common person; but he could not be vouched, because no summons could issue against him; instead, therefore, of vouching, the tenant ought to say, in the style of a remonstrance, that *sine rege respondere non potest, eò quòd habet chartam suam de donatione, per quam, si amitteret, rex ei teneretur ad excambium*. It seems that such respect was paid to the king's charter, that an allegation thereof was held sufficient cause to delay the proceeding. To remedy this, it had been lately provided, that the king should never be named in this way, unless where he was bound *ad excambium*.<sup>3</sup>

In vouching, the tenant ought to name the warrantor with all possible precision. Thus, if he was son as well as heir, he should be called son and heir. If many claimed to be heirs, they should be vouched disjunctively, *talis vel talis*, whoever of them was heir. If the heir was *in ventre*, and the wife had prayed to be put into possession *nomine ventris*, as seems to have been usual, then the tenant was at liberty either to name the person who was apparent heir, or him *in ventre*, stating in all such cases the special ground of ambiguity.<sup>4</sup>

If a person was vouched who was in the power of the tenant, as a wife, children, or others under his authority, the tenant was not to have the assistance of the court; but if he did not produce the vouchee, he was to lose his land. If the vouchee was not in the realm, he was not within the reach of the king's writ, and therefore it would be in vain to pray the assistance of the court; and if the tenant did not produce such warrantor, he would lose his land: but if the person vouched was in Ireland, the king's writ used to issue to the justices there.<sup>5</sup> If the vouchee resided within the power of the king's writ, and he could not be produced without the court's assistance, then there issued a writ to this effect, addressed

<sup>1</sup> *Satis habuit.*

<sup>2</sup> Bract. 382.

<sup>3</sup> This provision is said by Bracton to be made *coram ipso rege in dedicatione abbatissæ de Hayles in presentia novem episcoporum, et coram comite Richardo et aliis pluribus comitibus*. This, therefore, was an act of the legislature, and is one of those many acts of parliament which are now lost. The date of this provision is not mentioned.

<sup>4</sup> Bract. 382.

<sup>5</sup> *Ibid.* 395 b.

to the sheriff: *Summoneas per bonos summonitores A. quòd sit coram justitiariis nostris, &c., tali die ad warrantizandum B. tantum terra cum pertinentiis in tali villa quam E. in eadem curia coram iisdem justitiariis, &c., clamat ut jus suum versus prædictum B. et unde idem B. in eadem curia nostrâ coram iisdem justitiariis nostris vocant ipsam A. ad warrantizandum versus prædictum E., &c.*

The writ of summons *ad warrantizandum* always made mention of the sort of plea depending. If the warrantor was a minor, there was a writ of summons to the guardian to appear, and bring with him the heir. If an heir was vouched in respect of his mother's land, which was then in possession of his father as tenant *per legem Angliæ*, the warranty was not deferred, but a writ issued to him, expressed either to hear the judgment of the court on the warranty, or to warrant together with the heir.<sup>1</sup>

At the return of the summons, the demandant, tenant, and warrantor, might all essoin themselves. If the demandant made default, and the tenant appeared, the tenant had judgment to go quit; if the tenant, then there was a *capiatur in manus domini regis*, as in common cases. If the demandant and tenant both appeared, and the warrantor made default, then a writ of *capias ad valentiam* issued to take as much land of the warrantor as was equal to the value of the land in question. If the land of the warrantor was in another county, the sheriff of that county could not judge of the value of the land in question; to ascertain this, therefore, a writ first issued to the sheriff of the first county, commanding him by the oaths of twelve men of the vicinage *quid extendi faciat, et appreciari*, the land in question; upon the return of which extent, they grounded a writ of *cape ad valentiam* to the sheriff in the foreign county.<sup>2</sup> If a guardian made default, the *cape ad valentiam* issued against the lands of the minor; if either the tenant *per legem Angliæ* or the heir made default, the *cape ad valentiam* went against the maternal inheritance in the possession of the tenant *per legem*. If there was more than one warrantor, as in the case of parceners, the *cape ad valentiam* issued against all rateably, though if some appeared, they did not suffer by the default of the others, who were proceeded against separately.<sup>3</sup>

The writ of *cape ad valentiam* contained in it likewise a summons; and if the warrantor after the caption did not appear to this summons neither the first, second, third, nor fourth day, and the demandant and tenant both appeared, the former against the latter, and the latter against the warrantor, then judgment was given that the demandant should recover<sup>4</sup> the land against the tenant, by default of the tenant, and the tenant an *excambium ad valentiam* out of the land of the warrantor. Upon this there issued a writ

<sup>1</sup> Bract. 383 b.

<sup>2</sup> *Ibid.* 384.

<sup>3</sup> *Ibid.* 385.

<sup>4</sup> *Recuperat terram suam versus B. per defaultam B. et B. in misericordiâ, et habeat de terra ipsius C. in loco competentî excambium ad valentiam.*

for the demandant, commanding the sheriff *quòd habere facias seisinam*, and another for the tenant *de excambio* against the warrantor,<sup>1</sup> which latter was preceded by a writ of extent, if the land was in another county, as in the case of the *cape ad valentiam* before mentioned. If the warrantor had appeared, and afterwards made default, then there issued a *cape ad valentiam*, which was a *parum cape*; and if he<sup>2</sup> failed to appear to the summons therein contained, the demandant had judgment against the tenant by default, and the tenant *ad valentiam* against the warrantor, as in the former case: and so of the person or persons making default, if the warrantor was more than one person; though if husband and wife were summoned, and one made default, it was the same as if both had so done, whether before appearance or after. If the warrantor afterwards appeared, but had no sufficient excuse to save his default in not appearing at the first, second, third, or fourth day, then, in like manner as in the former cases, the demandant had judgment against the tenant, and the tenant over against the warrantor for an *excambium ad valentiam*, upon which issued writs of *habere facias seisinam* for both parties.<sup>3</sup>

If the demandant and warrantor appeared and offered themselves, and the tenant was absent, then, if he had not entered into the warranty, he *statim recedat quietus de warrantia*, and a *parvum cape* would issue for the land in question, and if upon the return thereof the tenant did not appear or could not save his default he would lose his seisin. If the demandant made default, and the tenant and warrantor appeared and offered themselves, they both *recedant quieti de brevi illo*. When a person was vouched who had no land in fee that might be taken into the king's hands or by which he might be distrained, then a writ issued to the sheriff,<sup>4</sup> *quòd habeat corpus*, to take the body.

When the demandant, tenant, and warrantor all appeared in court, the warrantor either entered into the warranty or contended that he was not bound to warrant. If he voluntarily did the former, the original suit then proceeded between the demandant and warrantor, and the tenant might leave the court till the plea between them was determined. The demandant was therefore to propound his count to the warrantor, in the same manner as he before had to the tenant, to which he was to answer, and defend the demandant's right by the duel or great assize, unless he could plead some exception or had a warrantor, whom he in his turn might call to defend him, and thus they might go on, one warrantor vouching another till none was left to be vouched; and if the last warrantor lost, either by default or by judgment, he would be liable *ad excambium*, and so on from hand to hand to the tenant.

If the warrantors were *C. D.* and *E.*, and *E.* had nothing where-with an *excambium* could be made, and all the others had sufficient, Bracton thought it hard that the tenant should go without an *ex-*

<sup>1</sup> Bract. 387 b.<sup>2</sup> *Ibid.* 386.<sup>3</sup> *Ibid.* 386 b.<sup>4</sup> *Ibid.* 387.

*cambium* ; and therefore, in his opinion, it appeared equitable that *D.* should, notwithstanding, recompense *C.* and wait for better times, when *E.* could do the same by him, so that the writ of seisin would run : *Et quia E. nihil habet unde excambium facere possit ipsi D., ideo de terris ipsius D. in belluam tuam eidem C., excambium ad valentiam predictæ terre, sine dilatione habere facias, donec idem E., aliquid habeat unde excambium facere potest, et illud idem excambium sine dilatione habere facias predicto B., &c.* The same was also done if any of the intermediate warrantors were unable to make an *excambium*. If the last warrantor could satisfy only in part, the remainder was to be supplied by the intermediate warrantors, observing the order in which they were vouched.

If a person had infeoffed several at different times, and was vouched by them all, and lost, without having sufficient to make an *excambium* to each, they were to be satisfied according to the priority of their feoffment. This is supposing that judgments were given in all the pleas in one day, for if they were at different times, those who had the first judgment should be preferred, and if they exhausted the property of the warrantor, those who came after, says Bracton, must wait for better times, for the warrantor, if he had nothing, was not therefore discharged ; but any thing which might afterwards come to him by descent from the ancestor by reason of whose warranty he was vouched, would be liable to be taken in *excambium*.

Should the person vouched, instead of entering voluntarily into the warranty, contend that he was not liable to be called upon, it lay with the tenant to make out the title by which he vouched.

The grounds upon which warranty might be founded have already been considered in part ; to those may be added the following :— One great ground of warranty was a common gift of land by the words *do* or *dedit* ; for it is laid down by Bracton, that in all charters *de simplici donatione*, the tenant was entitled to a warranty from the donor and his heirs, unless some clause was inserted specially declaring that the donor or his heirs should not be bound to warranty or to make an *excambium*. A charter of confirmation, if it contained the word *do*, as it usually did, *do et confirmo*, in like manner bound to warranty, because it was in effect a *simplex donatio*, as well as a confirmation.<sup>2</sup>

Many were the exceptions which might be stated by the person vouched to show he was not bound to warrant. In the first place, he might avail himself of any error in the writ of warranty, but he could not have a view. If the warranty was grounded upon a charter, he might show that the charter had such defects as to be of no validity in law, of which more will be said hereafter. If no exception lay to the charter, he might except to the gift. Thus he

<sup>1</sup> Bract. 388.

<sup>2</sup> Sometimes there was a special charter, expressing that the donor, notwithstanding the homage, should not be bound to warranty, or to make *excambium*.

might say, that the donee had not seisin in the life of the donor,<sup>1</sup> that the donor was never seised, that the tenant was not heir to the feoffee, that he was not such an heir as is described in the original gift, that he was one of those persons who were expressly excepted in the warranty.

A warranty was with reason held not to bind a person to defend the feoffee against the feoffee's own tenant, but only against strangers who might claim any right before the first feoffinent. If a person had recovered an *excambium*, where he had lost upon an act of his own, and had no lawful title to recover against his feoffor, as in the foregoing case, the feoffor had a special writ to obtain restitution of the land so wrongfully recovered.<sup>2</sup> Where a warranty was extended to the heirs and assigns, the assigns had an option, whether they would vouch the feoffee or the first feoffor.<sup>3</sup>

If the warrantor happened to die, the principal action was not abated, as it was by the death of either the demandant or tenant, but the warranty was suspended for a time, as in the case of a minor. We have before seen, that where the ancestor died seised in fee, the minor was bound to answer the warranty; and Bracton lays it down positively, that if in support of the warranty the tenant produced a cyrographum or fine made by the warrantor to the tenant, the warrantor was obliged to answer, though a minor, although he need not answer if it was grounded on a common charter, on homage, or on service done. But yet, as to the demandant, he should have his privilege not to answer till he was of age, unless, indeed, where his ancestor did not die seised in fee.<sup>4</sup> If the warrantor died at any time before judgment passed between him and the demandant, the plea did not abate, but the heir of the warrantor, whether a minor or not, was to be vouched; and if the warrantor had lost by judgment, but had not made an *excambium* and died, the heir was to make the *excambium* without any other writ being sued.<sup>5</sup>

There were instances where a person might enter into a warranty though he was not vouched. This was not in defence of the tenant's right but of his own, as if a person was tenant for life or in dower of land which was to revert to the tenant in fee, and the tenant in fee perceived that such tenant permitted himself to be impleaded, and omitted to vouch the tenant in fee to defend: in such case, the reversioner, seeing the danger his title was in, might appear unvouched, and enter into the warranty to defend his own right. It was considered as the duty of every tenant for life, if impleaded for the land he held, to vouch his warrantor to defend.<sup>6</sup>

When the person vouched after contesting the point was adjudged to enter into the warranty, the demandant was to recommence the principal action against him, propounding his count as against the tenant, with the additions which the change of persons and cir-

<sup>1</sup> Bract. 390.

<sup>4</sup> *Ibid.* 392.

<sup>2</sup> *Ibid.* 391 b.

<sup>5</sup> *Ibid.* 392 b.

<sup>3</sup> *Ibid.* 391.

<sup>6</sup> *Ibid.* 393 b.

cumstances required; as, *quod injustè intrat in warrantiam, quia terra de quâ agitur est jûs suum, quia talis antecessor suus &c.* The plea therefore went on between the demandant and warrantor, and this was the time for the warrantor to vouch over any person to warrant him, upon which a summons *ad warrantizandum* would issue similar to that before mentioned. If he had none to vouch, or chose to vouch none, then he either defended the right and seisin of the demandant *per corpus liberi hominis*, or put himself upon the great assize unless he had any exception to plead. Of these, some were common both to the tenant and warrantor, some belonged only to the tenant, and some only to the warrantor. No exceptions that had been made by the tenant and over-ruled, nor any which he had waived, could be pleaded by the warrantor.<sup>1</sup> If the warrantor succeeded either in his defence *per duellum* or by the great assize, or in any exception he proposed, the tenant remained in his seisin, and the demandant was *in misericordiâ*; if he failed in either, the tenant lost his seisin, and the warrantor, as before mentioned, was bound *ad excambium*.

Respecting the *excambium*, or recompense in value, it is clearly and repeatedly laid down by Bracton, that no more could be demanded than the warrantor possessed by descent from the original warrantor, so that property *ex parte maternâ* was not liable to make good a warranty *ex parte paternâ*, and *vice versâ*. In no case was land taken by purchase at all liable,<sup>2</sup> nor was a person bound to warranty beyond the value of the land at the time of the donation. Judgment for the *excambium* with the writ of seisin, and, where necessary, that of extent, have already been considered.

Before we dismiss the subject of warranty, it will be proper to consider two points which were very intimately connected with it; these are the manner of proving a charter, and of proceeding by *warrantia chartæ*. If a charter, was produced, and the person vouched denied the writing, the seal, and the gift, then the person producing it might maintain the gift to be lawful, and the charter to be valid; and, *inde ponit se super patriam, et testes* Proof of charters. *in chartâ nominatos*. Upon this, a writ issued to the sheriff, commanding him to summon *A. B. C. testes in chartâ nominatos quam D. in curiâ nostrâ coram justitiariis nostris profert, &c., et præterea duodecim tam milites quàm alios legales, &c., ad recognoscendum super sacramentum suum, si prædictus, &c.*<sup>3</sup> If the witnesses lived in different counties, different writs issued, but the *milites* always came from the county where the land lay.

Suppose the writing and seal were admitted, but the validity of the charter was questioned, because made while the donor was *non sanæ mentis*, or under age; or because extorted from him by force and fear while under restraint; or because obtained through deceit, being a feoffment in fee, when a term only was intended to be granted; in all these cases it lay upon the person producing the

<sup>1</sup> Bract. 394.<sup>2</sup> *Ibid.* 394 b.<sup>3</sup> *Ibid.* 396.

charter to prove the contrary. Sometimes the inquisition was made by the witnesses alone, and sometimes by strangers without the witnesses, according as the parties chose.<sup>1</sup> In the latter cases, there was always a clause in the writ directing that they should view the land. Some of these inquisitions were to be taken before the justices of the court where the suit depended, some before the sheriff and the *custodes placitorum corone*. If the witnesses and recognitors did not appear in court at the day, another writ issued to the sheriff, beginning thus:—*Bene recolimus ALIAS tibi præcipisse quòd, &c.*, and concluding with this injunction and caution:—*Et ita te habeas in hoc negotio, ne nos ad te graviter capere debeamus.*<sup>2</sup> The writ of *venire* always stated the issue which was to be tried, and was, therefore, as various as the matter which might become the subject of such inquiry.

When the witnesses and recognitors appeared in court, the witnesses having taken their oath, declared that they were present when the gift was made, and that the charter of donation was read and heard, homage accepted, and seisin lawfully given to the donee in their presence, with all due solemnity. Upon this the charter was pronounced to be valid, and the gift good in law. If they said they had only heard that such a charter was made, and homage accepted, but were actually present when seisin was given and the donee entered, this also was held sufficient to prove the gift good: and if they said they were present at all the other circumstances, but they knew nothing of the seisin, then the charter was proved, but the gift was invalid. If, says Bracton, the witnesses said they were present at the making of a note or memorandum to which both parties assented, this was held sufficient to prove the charter, though they were not present at the writing or signing of it.

If all the witnesses were dead, or out of the realm, so that none appeared to give testimony to the truth of the charter, then, of necessity, as in other cases, recourse must be had *ad patriam*.<sup>3</sup>

Yet Bracton says, that a charter might be proved in other ways than *per testes et per patriam*. The seal might be compared with another seal of the same person, which had been produced and proved in court, or acknowledged by him. If, upon comparison of the seals, there appeared an agreement between them, this amounted to a proof of the deed, unless the charter carried upon the face of it some circumstances of manifest suspicion; as rasure in any part which contained the fact of the charter; for as to that which contained the law of it, that, as in writs, was not so material; for *jura*, says Bracton, *ubiq; scribi possunt*. A diversity of hands, or of ink, raised only slight presumptions that might be done away by the testimony of the witness or the country.<sup>4</sup>

The proceeding by *warrantia chartæ* was this:—If a man was *warrantia chartæ* distrained by the chief lord to do greater services than were expressed in the charter of donation; this not

<sup>1</sup> Bract. 396 b.

<sup>2</sup> *Ibid.* 397 b.

<sup>3</sup> *Ibid.* 498.

<sup>4</sup> *Ibid.* 498 b.

being a plea concerning the right of the land itself, he could not have any remedy by vouching his warrantor, but he might summon him by the following writ:—*Præcipe tali quod sine dilacione WARRANTIZET tali tantum terræ, &c., quam tenet, et de eo tenere clamat, et unde CHARTAM suam habet, ut dicit. Et nisi fecerit, et talis fecerit te securum de clamore, &c.* Upon this there lay one essoin; and if he neither appeared nor essoined himself, there followed the process of attachment, the course of which will be particularly mentioned hereafter. When he appeared, he might contest the warranty, in the like manner as in case of a voucher. The above writ was the usual remedy where the tenant was vexed by the superior lord, who was paramount the warrantor; but where the warrantor exacted services, against the tenor of his own charter and warranty; some thought that a writ of *warrantia chartæ*, being for an injury, was not a proper remedy against his own lord, but that the proper remedy was by the writ *de recto de servitiis et consuetudinibus*, which would lead to the duel or great assize: however, according to the opinion of Bracton, this action *de injuriâ* was the proper course against one who had attempted to oppress and destroy the person whom he was bound by his own solemn engagement of warranty to defend.<sup>1</sup>

Perhaps the tenant had no person whom he could vouch to warranty; or he might decline vouching, and would rather put in his exception or plea, stating such matter as would either defeat or suspend the demandant's action. The different exceptions that might be alleged by a tenant are discussed at length by Bracton, from whom may be collected a short system of pleading, as understood and practised in his time.

Pleas, or exceptions, as Bracton terms them, were of two kinds, dilatory and peremptory. Again, of dilatory pleas, some were peremptory as to the jurisdiction, but only dilatory Of exceptions. as to the action. The order of stating exceptions, or of pleading, was first to the jurisdiction, next to the person of the plaintiff, then to the person of the defendant, next to the writ.<sup>2</sup> Yet Bracton says, that some lawyers did not adhere to this order, but thought that they might plead a latter plea first, and with a protestation save the benefit of a former, which they might plead afterwards, if necessary. It was agreed, however, that a defendant might plead more than one dilatory plea; but he could plead only one that was peremptory as to the action. A plea might be proved many ways, by an instrument, *per patriam*, or by an inquisition, says Bracton, consisting of impartial unsuspected persons, being neither acquaintance<sup>3</sup> nor domestics of the party; for which reason it could not be proved by a *secta*, which might consist of the party's acquaintance or domestics; and on that account a *secta* was never esteemed as a proof, but only as inducing a slight presumption, which might

<sup>1</sup> Bract. 499.<sup>2</sup> *Ibid.* 399.<sup>3</sup> *Familiares et domestici.*



be done away by a proof to the contrary, and by a defence *per legem*.<sup>1</sup>

Jurisdiction, or the authority of deciding between the parties to the suit, depended in general upon the maxim of the civil law, that *actor sequitur forum rei*; but this was controlled by a variety of exceptions (*a*). Thus matters relating to matrimony and testaments belonged to the spiritual court; matters of freehold and crime belonged to the king's courts. It was no uncommon thing

(*a*) The author hardly does justice either to the subject or the authority he follows. In the age in which Bracton wrote, between the great struggles under Henry II. and the great era of anti-ecclesiastical legislation, which commenced with the reign of Edward III., the subject of the distinction between the spiritual and secular jurisdictions was of immense importance. And to those who desire to form a judgment upon the events of those times, it is essential to have a clear idea of the principles then admitted. Bracton expounds the subject thus, and it must be borne in mind that he was a king's justiciary, and not likely to err in *favour* of ecclesiastical views. "Est etiam jurisdictio que pertinet ad sacerdotium et forum ecclesiasticum sicut in causis spiritualibus, et spiritualitati annexis: Est etiam alia jurisdictio que pertinet ad coronam et dignitatem regis ut regnum in causis et placitis temporalium in foro seculari; et unde videndum cujus iudicium, et forum acta adire debeat. Et licet generaliter verum sit quod actor forum rei sequi debeat, fallit tamen in casibus propter diversitatem jurisdictionum et causarum de rebus spiritualibus et temporalibus, et eorum sequela sicut in causa matrimoniale, et rebus premissis ab causam matrimonii: quoniam in foro ecclesiastico terminari debent: quia *cujus juris, i.e., jurisdictionis, est principale, ejusdem juris erit accessorium*. Et eodem modo sicut si in foro seculari agatur de aliquo placito quod pertineat et coronam et dignitatem regis et fides appositae in contractu, non propter hoc pertinebit cognitio super principale ad iudicem ecclesiasticum," (f. 401). Now, here the principle laid down is that the accessory follows the forum of the principal, which is clear and intelligible; and according to that principle, when a question arose as to patronage or endowments of ecclesiastical benefices, the jurisdiction ought to belong to the ecclesiastical courts, for surely the ecclesiastical cures and dignities were in such cases the "principal," and the endowments or the right of patronage, accessories. But Bracton, with ingenious, yet obvious sophistry, suggests that wherever the question was as to the "crown and dignity" of the king—(as, of course, it was always pretended to be)—in other words, that wherever the crown made a claim, then the jurisdiction must belong to the king's courts, according to which the king's courts would have jurisdiction wherever the crown made a claim. Now, the crown made a claim wherever there was any temporality annexed to a spirituality, so that wherever there was a temporality annexed to a spirituality, the crown, according to this, would have jurisdiction. Yet Bracton in the commencement of the passage says, that the ecclesiastical courts have jurisdiction in cases of spiritualities or of things annexed to spiritualities, which clearly appears to cover endowments which are annexed to spiritualities and patronage which is a right incident to endowment. According to Glanville, we have seen, where the question was between patron and clerk, the jurisdiction was in the ecclesiastical courts. Bracton, however, allows the ecclesiastical courts only jurisdiction over mere spiritualities. "Quia clericus in nullo conveniendus est coram iudice seculari quod pertinet ad forum ecclesiasticum, sicut in causis spiritualibus; et spiritualibus annexis, ut si pro peccato vel transgressionem fuerit poenitentia injungenda, et quo causa iudex ecclesiasticus habet cognitionem, quia non pertinet ad regem injungere poenitentias: nec ad iudicem secularem nec etiam adeos pertinet cognoscere de eis quae sunt spiritualibus annexa, sicut de decimis et aliis ecclesiarum provisionibus. Item nec de catullis quae sunt de testamento vel matrimonio. Item nec de pecunia promissa ab causam matrimonii quae est sequela matrimonii ut superius dictum est: et huiusmodi quia iudex ecclesiasticus in eis omnibus habet jus revocandi donum et quamvis in omnibus aliis actionibus sive placitis ad forum seculare pertinentibus videatur quod clericos sequi debeat forum seculare, sicut in actione injurarium vel criminis dum tamen civiliter agatur," &c. He goes on—"non est laicus conveniendus coram iudice ecclesiastico de aliquo quod pertineat ad

<sup>1</sup> Bract. 400 b.

in these times, as has been shown before, for a person to bind himself specially to be amenable to a certain court, or such court as the plaintiff should please to sue in. This was a voluntary renunciation of jurisdiction that was binding on the party so contracting.

We have already seen the controversy which was maintained by the clergy in favour of the spiritual jurisdiction; and it seems, that in the time of Bracton many had no scruple to contend, that clerks were not bound to answer before a secular judge in any plea whatsoever, whether of freehold, contract, or crime; but that venerable author, who has been so unjustly accused of a prepossession in favour of the civil and canon law, declares it as his opinion (*a*), in opposition to such notions, that they were amenable in all pleas civil or criminal, except only in the inflicting of a criminal sentence which affected life and limb; for there, though the secular judge had the cognisance, the execution was to be in the ordinary. Yet, as is observed by Bracton with some indignation, the practice was otherwise; for in capital offences the ordinary used to assume the cognisance as well as the execution,<sup>1</sup> notwithstanding he was bound by the canons not to judge in matters of blood.<sup>2</sup>

*coronam et Regium dignitatem et ad regnum, sicut nec de laico feodo, vel eis pertinentiis ratione predicta, ut si jura pertineant, sicut advocatio jura pascende,*" &c. So, according to this, an advowson or right of presentation to a spiritual living was as much an accessory to property as a right of common for cows. This is how the king's justice arrives at and applies his principle, that the accessory follows the principal, and that to the ecclesiastical courts pertain jurisdiction over things annexed to spiritualities!

(*a*) The author hardly represents the real effect of what Bracton says, nor, indeed, quoted him correctly, and the real effect of what he says is to show that upon his own principles he was wrong. He says—"Quamvis sunt qui dicant quod de nullo placito tenentur respondere, nec ratione rei contractus, vel delicti, coram iudice seculari et, (sic loce pace eorum) videtur, quod fit in omnibus actionibus et placitis secularibus et criminalibus præterquam in executione iudicii in causa criminali ubi laici condemnandus esset ad amissionem vite vel membrorum, et qui casu quamvis iudex secularis habet cognitionem ut cognoscat de crimine tamen non habet potestatem exequendi iudicium, sicut in causis civilibus, non enim possit degradare clericum magis quam ad ordines promovere, et ideo propter ejus defectus habet ordinariis executionem iudicii, licet aliter observatur quod in causa criminali ubi pena capitalis intelligenda est, habet ordinarius ut rangue, videlicet cognitionem et iudicii executionem" (*Bracton*, lib. v. c. ii. s. 5). Now, here it will be observed Bracton admits that the cleric could not be touched in life or limb until he was degraded, and that the lay tribunals could not degrade him. The natural inference from this would be that the lay tribunals should not try cases where they had no legal power to execute their sentences, especially as he admits that the ecclesiastical judges had power both to take cognisance of the case and to execute sentences, though not, indeed, to inflict any capital sentences. The passage, however, which our author refers to at the end of the above passage, in the text, is—"Super crimine iudex ecclesiasticus non habebit jurisdictionem licet habere debeat iudicii executionem,"—which involves another inconsistency, that a judge should execute the sentence of a tribunal of a totally different forum, proceeding upon rules and principles antagonistic to his own. "Pertinet igitur (ut videtur) ad iudicem secularem cognitio, et ad iudicem ecclesiasticam iudicii executio, quia iudex secularis degradare non potest." So the bishops were to execute the sentences of the lay courts. He elsewhere says, however, that clerks were to be delivered to their ordinaries before trial: "Cum vero clericus captus fuerit pro crimine, et decapitatur curia Christianitatis ab ordinario, ille statim ei deliberetur sine aliqua inquisitione facienda" (b 3, f. 123.)

<sup>1</sup> Bract. 401 b.

<sup>2</sup> *Ibid.* 407.

When a suit was commenced in the spiritual court for a matter which was properly cognisable at common law, the party so wrongfully sued might, as we have already seen, have a writ of prohibition to restrain the judge and party from proceeding further; the boundary, therefore, of these two jurisdictions is to be ascertained by a knowledge of the cases in which writs of prohibition were or were not allowed. This point was but slightly touched by Glanville, who confines what he says entirely to one or two writs;<sup>1</sup> but the subject of prohibitions is treated very fully by Bracton (*a*).

We find that a prohibition lay for a patron, not only where the rectors litigated a question concerning the whole tithes of the church, but also where the suit was for a part of them, as low as to the sixth part of the value of the advowson, but not lower; any-

(*a*) As already mentioned, the subject was one of great interest in that age, and it is not less interesting to those who desire to form a judgment on the events and controversies of those times. Bracton naturally, as a king's judge, treats the whole subject in a spirit strongly favourable to the jurisdiction of the king's courts, and he is betrayed into obvious inconsistency. Although he had laid down that the ecclesiastical courts had jurisdiction over things annexed to spiritualities, he lays down that they had not jurisdiction over advowsons or presentations to churches, though they had as to tithes; and though he admits their jurisdiction as to tithes, he says that if two rectors, under different patrons, contended about the tithes of their respective benefices, and the patron was not a party to the suit, yet as possibly the value of his patronage might be discussed, though he could not possibly be affected by a suit between these parties, the ecclesiastical court had no jurisdiction, unless the tithes were under a certain proportion, in which, it is manifest, there could be no principle (lib. 403). And then Bracton comes to the great question of custody of vacant bishoprics, which had formed the subject of such controversy under Henry II.; and he says that the king's courts could issue a prohibition as to things temporal, which pertained to the king by reason of his custody of vacant sees; and he gives an instance of such a prohibition to the dean and chapter of Rochester, "*Est et aliud genus prohibitionis ratione rerum temporalium quæ ad ipsum regem pertinere possunt ratione custodia archiepiscopatum et episcopatum vacantium et quæ occasione inducunt prohibendi sicut pro Sancto Edmundo archiepiscopo Cantuariensis et sit prohibition hac forma: Rex priori et conventu Roffensis. Ex relatione quorundam nuper dedimus quod cum venerabilis pater E. Cantuariensis archiepiscopus habeat custodiam episcopatus Roffensis nunc vacantis vos trahitis in curia Christianitatis eundem archiepiscopum autoritate literarium domini Papæ super quibusdam exenniis quæ prostanda, sicut de maneriis nostris, et eodem modo consuetudo qui alii annis redditus reddi solent episcopo si viveret, eoque idem archiepiscopus ea sibi reddi postulat ratione custodie ejusdem episcopatus temporæ vacationis. Et quoniam si vos in causa illa obbi-neatis manifestum esset nobis inde damnum incurrere si contingeret aliquando archiepiscopum Cantuariensis simul cum episcopatu Roffensis vacare et utrum que in manu nostra existere, vobis prohibemus in placitum illud sequamini, quia hoc esset contra coronam et dignitatem nostrum et prejudicium, libertatis nostræ quam habemus de episcopalibus vacantibus in regno nostri*" (fol. 404). According to this, in the first place, though the king no longer claimed what had in former reigns been relinquished, the custody of vacant bishoprics, which belonged to the archbishops, yet he claimed to intermeddle in the temporalities, on the ground of some possible future interest, in case the archbishopric should become vacant—in which case the king would claim the custody of the temporalities. Then Bracton says there is another prohibition where a clerk, presented by the king, was rejected by the bishops as insufficient; and another has been instituted and is sued by the other in the ecclesiastical courts, "*Ubi quis clericus presentatus ad ecclesiam per dominum regem propter insufficientiam recusatus fuerit et alius idoneus constitutus si velit inquietare velit*." And then he gives the form of prohibition.

<sup>1</sup> *Vide ante*, 175.

thing less than this being permitted to be determined finally by the spiritual judge.<sup>1</sup> There are many writs of prohibition for the maintaining of the king's rights during the custody of the temporalities; the pope and his partisans endeavouring to encroach on these secular claims, either by refusing clerks who were presented, or by other marks of opposition.<sup>2</sup> There is a writ of prohibition to stop a suit instituted against a bailiff of the king who had arrested a clerk for a felony or some other crime. If a suit was instituted in the ecclesiastical court to establish the legitimacy of children, with view to a claim to hold *per legem Angliæ*, a prohibition lay, because that court could not judge of legitimacy *quoad hereditatem et successionem*, unless a plea was depending in the king's court, and bastardy was objected; and then the trial used to be remitted to the ecclesiastical judge, as has been already frequently mentioned. A prohibition also lay, if the ecclesiastical judge proceeded in an inquisition of bastardy, after the death of the plaintiff or defendant.<sup>3</sup>

In the following cases, it is laid down by Bracton, that a prohibition would not lie to the spiritual court; in all spiritual matters, or those annexed to the spirituality, in matters matrimonial or testamentary, or where penance was to be enjoined. Thus, says Bracton, in a suit relating to any tenement *per pontifices Deo dedicatum*, and so held sacred, as abbeyes, priories, monasteries, and their cemeteries: or concerning things *quasi sacra*, because annexed to the spirituality, as lands, common, estovers, and the like given to a church, *in dotem*, as it was called, at the time of dedication; if the church was spoiled of these, and a suit was brought in the spiritual court for restitution, no prohibition lay; though this privilege was not allowed, if the lands were *in liberâ et parâ elemosynâ*. In one place Bracton expresses himself as if a suit in the spiritual court, when for a liberty, a common, and the like, could be maintained only on a *recent spoliation*; <sup>4</sup> though in another place he declares that recent spoliation should be tried by assize.<sup>5</sup>

A prohibition would lie to the following suits: to a suit *de catallis clericorum violenter ablati*, or for tithes; or for the value of them, if they were sold; <sup>6</sup> or on an obligation of surety for the purchase of tithes: or a promise of money *ob causam matrimonii*, not so if the promise was of a tenement; to a suit for a legacy, claiming it *ut debitum*; or for the legacy of a debt due to the testator, and acknowledge and proved to be such in his lifetime, because it so became a part of the testator's goods, which a debt, that had neither been proved nor confessed in his lifetime, or voluntarily confessed since, was not. Such a debt could only be established by suit at common law; till when it was no part of the goods, and so could not be bequeathed; it being a rule, first, that actions should not be bequeathed; secondly that the ecclesiastical judge should not have cognisance of them; and thirdly, that exe-

<sup>1</sup> Bract. 402 b.<sup>4</sup> *Ibid.* 408.<sup>2</sup> *Ibid.* 403, 404.<sup>5</sup> *Ibid.* 408.<sup>3</sup> *Ibid.* 404 b., 405.<sup>6</sup> *Ibid.* 407.

cutors should have no action for a debt which not acknowledged<sup>1</sup> (that is, grounded upon a recognisance or judgment) in the life of the testator. If goods were bequeathed and sued for, the same of houses and edifices in some cities and towns which the testator had purchased, these being made *quasi catalla testatoris*, by his own disposition, (though it was otherwise in London, where prohibition would lie); if a *ususfructus* of land, as a term for years, was bequeathed; a *ususfructus* being only a chattel; in all the foregoing cases, no prohibition would lie, in the time of Bracton;<sup>2</sup> for as the spiritual court was in unquestionable possession of causes matrimonial and testamentary, the above-mentioned questions, as arising out of a testament or marriage, were thought naturally to belong to the same tribunal. *Illud quod principale est trahit ad se quod est accessorium.*

It is laid down very positively by Bracton, that in a matter purely temporal litigated between two laymen, the jurisdiction of the cause could not be altered by any privilege whatsoever; and he instances the privileges of those who were *cruce signati*, which he considers as an indulgence warranted by no law: he says, that no oath, no *fidei interpositio*,<sup>3</sup> no voluntary renunciation of the parties could change the jurisdiction; as the renunciation of the party could have no effect beyond himself, it could not restrain the king in prohibiting a foreign jurisdiction from encroaching on his crown and dignity.<sup>4</sup>

The jurisdiction of a cause depended either upon the parties and the cause of action together, or on the cause of action singly. Thus, if a clerk sued a layman, or a layman a clerk, in the ecclesiastical court, in a matter purely temporal, a prohibition lay: the same if a clerk sued a clerk.<sup>5</sup> In these cases it appears that the cause of action was the principal ground of jurisdiction: but the cause of action would change its nature from spiritual to temporal; and so back again. Thus a lay chattel became spiritual, when tithed; and when the tithe was sold, it became again lay. Houses and other lay fees in cities and boroughs, if bequeathed by will, were, as has been seen, construed to be of a spiritual nature; but when the will was executed, they again became lay; and so of many others.<sup>6</sup>

There were two writs of prohibition, one to the judge, another to the party: the former ran thus—*Prohibemus vobis ne placitum teneatis in curiâ christianitatis, &c.*; the latter—*Prohibemus tibi ne sequaris placitum in curiâ christianitatis, &c.* If the judge to whom the prohibition was directed thought it well founded, he would decree a *supersedeas* of the proceeding; if he doubted, it was usual to *consult* with the king's justices; to which *consultation*

<sup>1</sup> *Recognitum.*

<sup>2</sup> Bract. 407 b.

<sup>3</sup> This was a pretence under which causes were drawn into the spiritual court, in the early times of our law, as has been shown in the former part of this volume. *Vide ante*, 164, 165.

<sup>4</sup> Bract. 408 b.

<sup>5</sup> *Ibid.* 406.

<sup>6</sup> *Ibid.* 412.

the justices would make answer by a writ, sometimes in their own name, and sometimes in the king's, as thus: *Dilecto in Christo tali. Inspectis literis vestris, quas nobis transmisistis, et plenius intellectis (sine prejudicio melioris sententie) consultationi vestre duximus respondendum, quod si res ita se habet sicut in CONSULTATIONE vestra nobis exposuistis, videtur nobis quod in causâ istâ bene potestis procedere, non obstante regia prohibitione.*<sup>1</sup> If no such writ of consultation was sent, the prohibition remained in force.

It was not uncommon for the ecclesiastical judge to baffle a writ of prohibition by hurrying on the process against the party bringing the writ, and entangling him in a sentence of excommunication. When a person had stood excommunicated for forty days, the bishop used to send a writ to the king intimating this, and praying the assistance of the secular arm; *invocantes, quod minus valet ecclesia in hac parte, dignetur regia supplere majestas*; the design of which was, that the party should be apprehended. But, upon suggestion of the fraud, the party might obtain another writ directed to the sheriff *de non capiendo*, which likewise commanded the sheriff to attach the clerical judge, that he might answer to the fraud. Any malicious application of the process of excommunication might be combated in the following manner. If a person was rightly excommunicated, and, having continued so for forty days, was imprisoned, and tendered surety for being forthcoming and answering to the suit, it ought, says Bracton, to be accepted; and accordingly a writ might be obtained, commanding the sheriff that if the ordinary maliciously refused a sufficient surety, the sheriff himself should take it, and order the prisoner to be set at large.<sup>2</sup>

If, instead of the above device, the judge and the party refused obedience to the writ, they might both be attached to appear either *coram rege*, or his justices *de banco*, or the justices itinerant, to answer for their contempt. This writ of attachment differed somewhat from that used on the same occasion in Glanville's time:<sup>3</sup> instead of repeating the prohibition, as it did then, it now began like other writs of attachment: *Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. talem ordinarium, quod sit coram nobis*, as the case might be, *ostensurus quare tenuerit placitum in curiâ christianitatis de luico fædo ipsius A. in tali villâ contra prohibitionem nostram. Pone etiam per vadium et salvos plegios E. quod tunc sit ibi ostensurus quare secutus est idem placitum in eâdem curiâ christianitatis contra prohibitionem nostram; et habeas ibi nomina plegiorum et hoc breve, &c.* If the judge and the party lived in different counties, then there were separate writs for each. The process was the same as in other personal attachments,<sup>4</sup> of which we shall speak more particularly hereafter.

<sup>1</sup> Bract. 405 b. 406.<sup>3</sup> Vide ante, 175, 176.<sup>2</sup> Ibid. 408, 409.<sup>4</sup> Bract. 409.

When the parties on both sides appeared in court, the plaintiff stated his count or declaration, or, as Bracton calls it, *intentio*, in this way: *Ego A. conqueror de B. quod me injustè vexavit, et gravavit trahendo me in placitum in curiâ christianitatis de laico fado meo, scilicet, &c., unde damnum ad valentiam, &c.*; and to confirm and support his declaration he should add, that he showed the writ of prohibition in full court, and that, notwithstanding this, they proceeded to examine witnesses, or to excommunication; and then he should conclude by producing a *secta*, consisting of two at least, and as many more as he could procure. If the *secta* disagreed in their testimony, it was the same as if none had been produced; but as this was only a failure of proof, and not of right, the defendant used, nevertheless, to be enjoined not to proceed in the ecclesiastical court. If the *secta* agreed, then the defendants were to answer, and this might be done several ways. They might plead that it was a case of spiritual cognisance where no prohibition lay; or they might confess it to be temporal, but might, for plea to the plaintiff and his *secta*, say, that they did not proceed after the prohibition; or that no prohibition was tendered to them; and then each defendant might wage his law *duodecimâ manu*. When law was waged, and pledges given *de lege faciendâ*, a day was given to the parties for making their law; at which day they might cast an essoin, and have another day by their essoiners; at which day, if they did not come nor cast an essoin, judgment was passed against them, and they were obliged to pay damages to the plaintiff.

If they appeared, they were to produce their compurgators, who, like the *secta*, might consist of their friends and acquaintance. The *compurgatores* not being required, any more than the *sectatores*, to be equally impartial with recognitors, it was sufficient if they were of good report, and in general deserving of credit, and they needed not to be of the same rank or condition with the person producing them. The words in which *the law was to be made* were to pursue the form of the record; if they varied therein, the defendant stood convict, and, if a layman was committed to jail as guilty of a misdemeanour against the royal dignity, in the same manner, says Bracton, as if he had committed a crime of *læsa majestas*; if a clerk, then, in consideration of his orders, he was, according to the same authority, treated more mildly; though he does not mention the sort of penalty: the damages [used to be taxed in both cases by the justices according to the nature of the case.

This is the account given by Bracton of the manner of proceeding on a writ of prohibition; and it may be presumed that the proceeding in other personal writs was exactly similar. When Bracton comes to the subject of personal actions, he breaks off abruptly without carrying the reader through the whole proceeding, as he has here through the proceeding on a prohibition. This



defect must be supplied, if possible, by what is to be picked up in other parts of his work, and particularly from the proceeding in prohibition which has just been related.

Thus far of questions relating to the jurisdiction of spiritual and temporal causes. Many other exceptions might be of jurisdiction made to the jurisdiction of the judge. First, it was to <sup>tion.</sup> be seen whether he had a proper authority: and in order to ascertain this, it is directed by Bracton that the writ by which the justice was appointed, after reading the original writ, should be read, unless the original writ made mention of his judicial authority. If the judge delegated his authority to another, the proceeding before such delegated person would be *coram non jure*. Certain persons had peculiar privileges in judicial matters. Thus, the Hospitallers, Templars, and many others had the privilege to be sued nowhere but *coram ipso rege, vel capitali justituario*. The citizens of London were not to answer to any plea out of the city, except *de tenuris et contractibus forinsecis*. The barons of the cinque ports were to answer nowhere but *apud Sheppey*.<sup>1</sup> It is said by Bracton,<sup>2</sup> that if a judge was suspected of any partiality, favour, or malice, it ought to be a ground of exception; but this he seems to give as an opinion of his own; yet he lays it down as settled law, that the jurisdiction of a judge might be declined, upon a real cause stated; as for consanguinity to the plaintiff, or being his friend, or companion, or counsel, or pleader to the plaintiff in the present or any other cause, or if he was an enemy to the defendant. All these are stated by Bracton as causes of exception to the judge exercising his jurisdiction to decide between the parties.<sup>3</sup>

When the jurisdiction of the court had been controverted and established, then was the original writ to be read again, and the tenant was to make such exceptions as the law allowed against the form of the writ. The requisites to constitute a legal and regular writ were many. It must be adapted to the cause of action. Thus, says Bracton, if a *magnum breve de recto putens* <sup>Abatement of</sup> was brought, when it should be a *parvum breve* <sup>the writ.</sup> *clausum*, the writ would abate though the action remained. Writs should be brought in their proper order. Thus, where a person had a cause of action that would entitle him to more writs than one, and he brought a writ of right, he could not, generally speaking, afterwards bring an inferior writ to recover the possession; though there were instances where a demandant had gone so far as to pray a view in a writ of right, and afterwards was permitted to sustain an assize of novel disseisin. A writ failed if it was grounded on the mode and quality of a fact, when it ought to be grounded on the fact itself; as the principal, says Bracton, should always be determined before the accessory. Thus, as has been observed in

<sup>1</sup> Bract. 411.

<sup>2</sup> This was a good exception in the canon law, under the name of *Refutatio*. *Corr. Jus. Canon*, 279.

<sup>3</sup> Bract. 411 b, 412.



another place,<sup>1</sup> a man disseised with violence should not bring a writ, *quare vi et armis*, because it only went to the quality of the disseisin, and not to the recovery of the tenement disseised.<sup>2</sup>

It was required that a writ should contain in it neither falsity nor error. It should, upon the face of it, appear free from all blemish. This seems to be required by Bracton more particularly in a writ patent; and whether it was patent or close, it should have no rasure: yet a difference was made between rasures. Thus, if it was in stating a fact the writ failed, for names and facts should be stated with fidelity, and if such an error was made either by the chancellor, or by some clerk, or the sheriff, or the attorney, the person guilty would, according to Bracton, be *in misericordia* to the king for all his goods, and be liable to be punished as for forgery. If a false seal<sup>3</sup> was affixed, or even the true seal falsely applied, that is, to a false writ, this was considered as an offence of majesty; and the offender, if a layman, was punished capitally; if a clerk, he was degraded and rendered infamous.<sup>4</sup> A writ abated, if obtained upon suggestion of falsehood, or the suppression of truth.

If the demandant or tenant died, the writ abated, and the action too; but if they were more than one, as parceners having one right, then, though the writ abated, yet the action survived.<sup>5</sup> If there was any error in the names of persons in the county or vill, the writ abated. If the tenant held less than the demandant claimed, the writ failed; not so if he held more. If, pending one action, the demandant brought another writ for the same cause of action, the second writ abated. We have before said, that the writ abated if the demandant died: it was the same if, being a bishop, or an abbot, or the like, he was deposed; but not if such bishop, abbot, or the like, were tenant in the action, for then the action would only be suspended till a successor was appointed, especially if the action was civil and not penal:<sup>6</sup> if it was both civil and penal, the action would hold both *ad pœnam* and *ad restitutionem*, as long as he lived; but if he died, whether before or after deposition, the penalty was extinguished with the person, yet an action would lie against the successor for restitution by another writ. A personal writ abated by the death of the tenant, whether such death was civil or natural, but the action survived. A civil death followed upon an entry into religion, and if this was procured fraudulently after the purchase of the writ, it seems it would not abate the writ. If the demandant in his declaration exceeded the limit of the writ, as on a writ of possession to count for the right, the writ abated.

In short, almost all exceptions, says Bracton, which could be alleged might be properly ranked among pleas to the writ; because, if they went to the action, when the action was determined, the

<sup>1</sup> *Vide ante*, 338, 339.

<sup>4</sup> Bract. 413 b.

<sup>2</sup> Bract. 413.

<sup>5</sup> *Ibid.* 414.

<sup>3</sup> *Tanquam falsarius.*

<sup>6</sup> *Ibid.* 414 b.

writ was, of course, at an end: whether the action was abated, postponed, or suspended, so was the writ. It was the opinion of some, that all pleas to the writ must be propounded, *simul et semel*, in one day.<sup>1</sup> When the writ was abated by reason of any defect or error, and such defect or error was corrected, it was considered as the same writ and the same action, though it was actually another piece of parchment and another seal, and therefore neither the declaration or count, nor the attorney, needed be changed.<sup>2</sup>

If the writ was open to no exception, then the defendant was to see if there was any against the person of the plaintiff, <sup>pleas to the</sup> so as that he could not at all, or at least not at that <sup>person.</sup> time, make his demand. Thus, it might be urged, that the demandant was a *seruus*, or a bastard, or *seculo mortuus*; that he was mad, and *non sane mentis*; or born deaf and dumb; or a leper; that he or some ancestor had been attainted of felony; that he was a minor. If a person was appealed of felony, he could not bring a civil suit till he had defended himself; nor could a defendant, under such circumstances, be bound to answer. It was a good plea to say, that the plaintiff was in confederacy with the king's enemies, or was in allegiance to the king of France, or to say that he was excommunicated.<sup>3</sup> It might be said, that the demandant had no right, but as parcener with another; or in right of his wife, so as he could no more sue without her than she without him.<sup>4</sup> Of some of these pleas we shall now speak more particularly.

The plea of bastardy was peremptory, for, if proved, it excluded the demandant for ever from making any claim. It was always required that the special matters should be stated in the plea, otherwise there would be an obscurity and doubt whether the bastardy should be tried by the ecclesiastical court or not. Thus, having said *nihil juris habes in terrâ petitâ quia bastardus es*, it should go on, *quia pater tuus nunquam desponsavit matrem tuam*; or thus, *quia inter patrem tuam et matrem tuam contractum fuit matrimonium illegitimum ex quo prius contraxit cum quâdam, quæ vixit tynpore, quando contraxit cum matre tuâ*; in both which it appears, that inasmuch as the question arose upon the marriage, it must be tried by the ecclesiastical court. But if it was thus, *quia natus fuisti per tantum tempus ante sponsalia vel matrimonium contractum inter putrem tuum et matrem tuam*; then in such case, as the marriage was admitted on both sides, it is the opinion of Bracton, that the question, whether born before marriage or after,<sup>5</sup> might very well be inquired in the king's court.

We have before seen what scruples had been raised by the ecclesiastics upon this question of *natus ante matrimonium*, and what a positive declaration was made by the king and barons in the statute

<sup>1</sup> Bract. 415.

<sup>2</sup> *Ibid.* 415 b.

<sup>3</sup> The leprosy of the mind, as Bracton calls it, like that of the body, as it excluded the unhappy object from the communion of men, so it precluded him from doing any lawful act.

<sup>4</sup> Bract. 415 b., 416.

<sup>5</sup> *Ibid.* 416.

of Merton, passed in the twentieth year of this reign.<sup>1</sup> The matter was not suffered to rest there. We are told, that in the same year the king held a council, consisting of several bishops and lords, and that it was agreed by them all, that whenever the issue of *natus ante matrimonium* arose in the king's courts, the plea should be transmitted, to the ordinary; and that an inquisition being made by him in precise words, *utrùm talis natus sit ante matrimonium vel post*, he should send his answer to the king's court in the same words precisely, without any cavil:<sup>2</sup> that in taking such inquisition, all appeal should cease, as in other inquisitions of bastardy transmitted to the ordinary, and particularly if there should be need of an appeal that it should not be made out of the kingdom. It was commanded that this should be the practice in future. This regulation entirely precluded the ordinary from giving any judgment on the legitimacy, and confined him to the single inquiry of the fact, which he was required to certify in the very terms of the issue, leaving the king's judges to make their own conclusion upon it, which is precisely what Glanville lays down as the law upon this subject.<sup>3</sup> But, before this provision of the council, a practice had obtained, as we have just said, of trying this special question of bastardy in the king's court. Thus, in the eleventh year of this king, in a writ of mortmaincester, the jurors found that the demandant was not the next heir, being born in adultery before marriage. It seems to have been considered as in the election of the king's judges, whether they would send such an inquisition to be made in the ecclesiastical court, or would try the question in their own.<sup>4</sup>

It is not, however, improbable, that it depended upon the form of the issue which court should be resorted to, or finally relied on, for the trial of this question; for if the demandant replied generally *quòd legitimus*, without answering to the special matter, and this obscure issue was sent to the ecclesiastical court, that court would probably certify generally *quòd legitimus*; but this would be such a failure in the ecclesiastical court as to induce the judges to cause an inquisition to be made in the king's court on the special matter: the same, if the reply had met the special matter, and the ecclesiastical court had certified generally *quòd legitimus*; though Bracton seems to think that such a general and obscure reply to the special cause of bastardy would pass for no reply at all, and that the demandant would be barred for want of a replication; and that, if he was a defendant, there would, in like manner, be judgment against him for want of a defence.

There were some questions of bastardy that would not, under any pretence, be transmitted to the ecclesiastical judge; as in case of a posthumous<sup>5</sup> or a supposititious child; or where the father had been absent from the mother abroad, so as to leave no presumption

<sup>1</sup> Vide ante, 266.

<sup>4</sup> Bract. 417.

<sup>2</sup> Sine aliquâ cavillatione.

<sup>5</sup> Ibid. 417.

<sup>3</sup> Vide ante, 118.

of legitimacy, which, however, depended upon the distance and the probability of access.<sup>1</sup> The plea of bastardy would not lie between persons of the same blood, in a possessory action (though it might between strangers), nor in a plea *de consanguinitate*, any more than in an *assisa mortis antecessoris*, because a question of bastardy between such parties was always upon the mere right, if the inheritance descended from a common ancestor; and so a question of right would be agitated in an action grounded only upon the possession. It might be urged that such a plea was good, by the above rule, because a bastard was in truth a mere stranger as to the true heir; yet Bracton thought not, for it was at least doubtful whether he was not legitimate.

When bastardy was pleaded, and the other party maintained his legitimacy, it seems there was no rule, whether the bastardy or the legitimacy should be proved, except this, that the party who was *extra seisinam* should prove his plea, the person who was in seisin having no need, as Bracton says, to make out either one or the other; and this was the governing rule, whether the plea came from the tenant or demandant:<sup>2</sup> so that in this issue the point to be proved was, sometimes the legitimacy, and sometimes the bastardy, according as the *onus probandi* was imposed by the above rule.

The writ to the ordinary in cases of bastardy differed very little from that used in the time of Glanville. It recited that writ to the a suit was commenced, and that bastardy was objected ordinary to one of the parties: *Et ideo vobis mandamus, quid, convocatis eorum vobis convocandis, rei veritatem inde diligenter inquiratis, videlicet, atrium A. &c. Et inquisitionem, quam inde feceritis, scire faciatis nobis, vel justitiariis nostris talibus per literas vestras patentes. Teste, &c.*, and so, *mutatis mutandis*, according to the special cause of bastardy. There was this difference between the writ of *natus ante matrimonium* in the time of Glanville, and that now in use, that they no longer inserted these words, *et quoniam huiusmodi inquisitio pertinet ad forum ecclesiasticum*; an alteration which probably had taken place since the statute of Merton, and the above-mentioned provision of the council on that subject. The same was observed if the ordinary was directed, as he sometimes was, to inquire concerning the legitimacy of a posthumous child; both these questions being triable as well at common law as in the spiritual court. But the above form of words was retained in all cases that were purely of ecclesiastical cognisance.

When the writ was sent to the ordinary, the plea remained *sine die* in the king's court till the inquisition was returned. The ordinary was to proceed to make inquisition in the presence of the parties, if they chose it,<sup>3</sup> and when made, there lay no appeal. When the inquisition was returned, the plea and the other party were summoned. The effect of a legitimacy proved in this way, if confirmed by a judgment in the king's court, was, that the party became

<sup>1</sup> Bract. 418.<sup>2</sup> *Ibid.* 418 b.<sup>3</sup> *Ibid.* 419.

legitimate against all the world, unless any fraud could be proved in the method of proving it, and in the inquisition. A fraudulent inquisition might be obtained in this way. A demandant might bring several writs for recovery of land, and procure one of the tenants to object bastardy, and to suffer an inquisition to pass in his favour, for want of contesting the proofs of legitimacy. Legitimacy, when regularly proved, was good against all the world, and the heir of such person was likewise entitled to the benefit of it. It was a rule that no person's legitimacy could be questioned after his death by plea pleaded, as he could not, says Bracton, make an answer to it; but, notwithstanding, it might be inquired *per patriam* whether such person was a bastard or not, in the same manner as the question whether a person held in free tenure or in villenage; although it could not be inquired, after his death, concerning the personal condition of such person.<sup>1</sup> When profession, or entering into a religious life, was objected, this issue was always transmitted to the inquiry of the spiritual court.<sup>2</sup>

The plea of minority of the demandant was only a dilatory exception that did not abate the writ, but suspended the action till he came of age, at which time the plea would be resummoned. There were some actions which a minor might bring, and some which he might not. A minor might demand his own seisin by assize of novel disseisin, and the seisin of his ancestor by *assisa mortis antecessoris*; but when he had so recovered, he was not obliged to answer either for the possession or right, till he was of age: yet he could not demand land in free socage of his ancestor's seisin, in a writ of right, before he was fourteen years old, nor *feudum militare* till he was completely twenty-one years old. On the other hand, a minor was bound to answer as well upon the right as upon the possession, if he had been enfeoffed of the land in question during his minority; and would have all the privileges of essoins, vouching, and the like, except that he could not appoint an attorney, and consequently he could not have the essoin *de malo lecti*. A minor was obliged to answer for a fact and injury of his own in a civil or criminal suit. Thus, he was liable to an assize of novel disseisin, and to a suit for dower. But where a grandmother had neglected for ten, twenty, or thirty years, during the life of her son, to demand dower, and brought a writ against the grandson, she was obliged to wait till he was of age, on account of the probability that she had agreed with her son and released the claim.<sup>3</sup>

A minor was obliged to answer in a matter that concerned the king. For such purpose, an inquisition might be made, whether his ancestor died seised *ut de feodo*, without prejudicing the heir. A minor must answer to a fine, if pleaded; but if he was vouched by virtue of a fine, he need not answer; though he would be obliged to answer in *warrantia cartæ*. A minor must answer in

<sup>1</sup> Bract. 420.<sup>2</sup> *Ibid.* 422 b.<sup>3</sup> *Ibid.* 421 b., 422.

*assisa mortis antecessoris*, and in every other plea concerning anything of which his ancestor did not die seised *in dominico ut de feodo*, but concerning nothing of which he died seised *in dominico ut de feodo*. If a minor lost by assize in a writ of possession, he might, when of age, recover in a writ of right. A minor must answer as well on the fact of another as on his own, so as to make restitution, though not *quoad personam*; as when a writ of entry was brought immediately after the death of the ancestor who had committed disseisin. A singular instance, where the privilege of infancy was dispensed with, is mentioned by Bracton. A man bound himself and his heirs to answer whether they were of age or not. This obligation was made in and by the advice of the court, and the heir was adjudged to answer, though a minor.

In the case of inquisitions taken for the king, a minor might have a writ to the following effect, to save himself from being affected thereby:—*Rex vic. salutem. Præcipimus tibi, quod non implacites vel implacitari permittas A. qui est infra ætatem, ut dicitur, de libero tenemento suo in villâ, &c., donec idem A. sit ætatis quod possit et debeat secundum legem et consuetudinem Angliæ de tenemento respondere.*<sup>1</sup> If a minor was vouched to warrantry in the county, he might have the following writ to the sheriff: *Præcipimus tibi, quod non permittas quod A. implacitet B. de tante terrarum pertinentiis in tali villâ, unde idem A. trahit ad warrantum C. qui est infra ætatem, et warrantus ejus esse debet, ut dicit, donec idem C. sit talis plenæ ætatis quod possit et debeat secundum legem et consuetudinem Angliæ terram warrantizare.*

If there were more demandants than one, as parceners, and one was a minor, it would be a good plea against all; the same, if parceners were tenants. So if a man seised in right of his wife was tenant to a writ, together with her, and she was within age, the plea against both would remain *sine die* till she was of age: not so if the husband was a minor, because, says Bracton, a woman might, by contriving such a marriage, defeat suits against her respecting her own lands. If the husband and wife were demandants, and she was a minor, and married before the writ purchased, the plea would remain *quousque*: if she married after, the writ abated, should the tenant so please, or the action was suspended till she was of age.<sup>2</sup>

Such consideration was shown to the feeble condition of a minor, that his estate, whether in services or tenements, descended to him from his ancestor, who was *peaceably seised* thereof *anno et die quo vivus, et mortuus fuit*, was not to be called in question till he was of full age. So, on the other hand, if a minor demanded services that were not due to him, and the tenants alleged,<sup>3</sup> *quietunciam quo die et anno antecessor vivus et mortuus*, they need not answer till he was of age. A minor was not obliged to answer to any *charta* till he was of age.<sup>4</sup> This held not only in services or tenements,

<sup>1</sup> Bract. 422.<sup>3</sup> *Quietunciam*, peaceable seisin.<sup>2</sup> *Ibid.* 423.<sup>4</sup> Bract. 423.

but in rights and liberties, by which the tenements of others were affected ; as a liberty to make a road, build a mill, and the like. Although he did not actually use these easements, yet he was considered in possession thereof till ejected or disseised ; and such a seisin would descend upon the heir, whose estate therein was not to be changed during his minority.<sup>1</sup>

To a plea of minority in a writ of right or *assisa mortis antecessoris* against a guardian, the demandant might reply that he was of full age, as appeared by all his lords having restored his inheritances to him ; or he might say, he had proved himself of age, either by inquisition *per patriam*, or before certain justices. To this it might be rejoined, that his inheritances were restored to him *per fraudem* ; or that the jurors had sworn falsely, or that the justices had been deceived. The only sufficient and complete proof of full age was that by the parents, and the examination of witnesses ; all others, as inspection and the like, were held only to induce a presumption : yet, says Bracton, if the justices, upon sight of the person, judging from his stature and other circumstances, pronounced him to be of age, his age was confirmed by judgment, and could not be again disputed. Should the justices hesitate to pronounce an opinion, then recourse was of necessity had *ad probationem patrie et parentum*. This, says Bracton, was to be done by twelve lawful men, or more if necessary, some of whom were to be *ex parentela* of the person who said he was of age, the rest were to be strangers : all these were to be unsuspected, and were to declare the truth upon their oaths.<sup>2</sup> Another presumption of full age was a conclusion arising from the party having brought actions as a person of full age, which was an admission that would preclude him from pleading his infancy to any action brought against himself ; whereas a proof of full age by jurors, according to some opinions, was not held conclusive against other persons, because the jurors might perhaps swear falsely.

If the minor was demandant, the proof was made without any resummions ; but if he was tenant, and pleaded his minority, then the proof was not made till after a resummions. This was sued out by the demandant ; and on the return, if there was any doubt, then they entered upon the proof in the way before mentioned.<sup>3</sup>

The excommunication of the demandant was only a dilatory plea. **Excommunication.** This was to be proved by the letter of the ordinary, or some judge delegated by him with proper authority. To this exception it might be replied that he was absolved upon an appeal, or that the cause of his excommunication was, his not obeying the ecclesiastical judge in a question of lay fee, and the like.<sup>4</sup> We have seen before, that when a person had been excommunicated for forty days, the ordinary used to certify this contempt, and, upon receipt of the bishop's letter, the chancellor would issue a writ to the following effect, directed to the sheriff : *Signifi-*

<sup>1</sup> Bract. 424.<sup>2</sup> *Ibid.* 424 b.<sup>3</sup> *Ibid.* 426.<sup>4</sup> *Ibid.* 426 b.

*sait nobis venerabilis pater N. per litteras suas patentes, quòd A. ob manifestam contumaciam suam excommunicatus est, nec se vult per censuram ecclesiasticam iudicari. Quia cerò potestas regia sacro canctor ecclesie in querelis suis deesse non debet, tibi precipimus, quòd prædictum A. per corpus suum (secundum consuetudinem Angliæ) justicies, donec sacrosanctâ ecclesiâ vim de contemptu quam de injuriâ ei illatâ fuerit satisfactum. Teste, &c.* When the person was taken, and had satisfied the ecclesiastical judge, he might be discharged, at the command of the bishop, by the following writ to the sheriff: *Quia venerabilis pater N. episcopus significavit nobis, quòd A. quantum ad mandatum suum à te capi, et per corpus suum tanquam contumacem clivis ecclesiâ iudicari præceperimus, beneficium absolutionis impendit, tibi precipimus, quòd à prisoni nostrâ quâ detinetur ipsum deliberari facias quietum, &c.* As no one could be taken, so none could be discharged, but by the command of the bishop; the law not giving such credit to an archdeacon or other delegated judge; because, says Bracton, *rex in episcopos coercionem habet propter baroniam*: nor was the party to be discharged till he had satisfied the ecclesiastical judge, unless where an excommunication was obtained by a false suggestion of the ordinary himself, or the malice of an adversary, in order to preclude the party from the right to bring an action; in which case a writ used to issue to the sheriff, reciting the fraud, and commanding him to discharge the injured person upon sureties, *nisi captus fuerit aliâ occasione, quare deliberari non debeat*. We have before seen that where such malicious proceeding was apprehended the party might be beforehand with the ordinary by the writ *de non capiendo*.<sup>1</sup>

*Participes* were either co-heirs or *parceners*, or such as were afterwards better known by the name of *joint-tenants*.

If an action was brought by one of several *parceners*, it might be pleaded, *quòd non tencor ad hoc breve respondere, quia si jus haberes, participes habes, qui tantundem juris haberent in se quantum et vos, scilicet A. et B.* To this it might be replied, that all who could claim any right were named in the writ,<sup>2</sup> and no right was in *A.* because he was a bastard; nor in *B.*, because, born of a villein, although his mother, from whom he claimed, was free; he might say, that the other *parcener* was in liguance to the king of France, or that his ancestor committed felony, and many other matters might be replied to show that the *parceners* not named had no right.<sup>3</sup> If *parceners* were all of capacity to sue, and some brought a writ, and recovered without naming the others, Bracton says it was the duty of the judge to take care that the interest of those not named suffered no injury by this fraud. If they were all named, and some declined proceeding, yet the writ would stand good, and those who did not appear would be summoned, *quòd sint ad sequendum simul* with the other *parceners*, thus: *Summone per bonos sum A. et B. quòd sint coram justiciariis*

<sup>1</sup> Bract. 427.<sup>2</sup> *Ibid.* 428.<sup>3</sup> *Ibid.* 428 b.



*nostris die, &c. et loco, &c. ad sequendum cum C. et D. de tantâ terrâ unde prædictæ C. et D. clamant duas partes versus E. ut rationabilem partem suam, quæ eos contingit de hæreditate R. cujus hæredes ipsi sunt, et unde prædictus E. dicit quodd non vult prædictis C. et D. respondere sine prædictis A. et B. ut dicit; et habeas ibi, &c.*<sup>1</sup>

If the writ was brought against one parcener, he might, in like manner, plead this to the writ. But there was some difference, whether the inheritance was divided or not. If not, and they held in common, each had the same right to the whole; not indeed to himself, but only in common with the others; or, as they expressed it, *totum tenet, et nihil tenet, scilicet totum in communi, et nihil separatim per se*. If the inheritance had been divided, and each held *pro parte*, the other parceners need not be named; yet, on the other hand, says Bracton, the tenant was not bound to answer without his parceners, and in prudence he ought not; for if he did, and he lost the land, he could have no *regressum* against his parceners to obtain a contribution. The tenant, therefore, if he pleased, might have a writ to summon them: *Summone, &c. quodd sint coram justiciariis, &c. AD RESPONDENDUM C. SIMUL CUM D. de tantâ terrâ, &c. quad idem C. in curiâ nostrâ clamat, &c., et sine quibus prædictus D. non vult respondere. eidem C. cum prædicti, &c., sint participes ipsius D. de terrâ prædictâ, &c.* Should they appear, they might answer together with the tenant; but if they declined answering, the plea still proceeded; and whether they appeared or not, the tenant, if he lost, would be entitled to contribution. If the inheritance was not divided, then all the parceners must be made parties; but upon a plea that there were other parceners, the demandant might reply such matter as would disable them from claiming any right, and therefore as not being persons who need be named in the writ, the same as was before said in the case of a demandant.<sup>2</sup>

If there was no plea to the person, either of the demandant or tenant, the next consideration was such as might arise upon the matter itself. The thing in demand ought to be stated with certainty; in which the count or declaration, or, as Bracton calls it, the *intentio*, or *narratio*, should correspond with the writ.<sup>3</sup> Perhaps the tenant in the action was not tenant of the land, or was tenant only of a part; or perhaps he held it only in the name of another. Thus he might hold it in ward, *in vadium*, at will, or for term of years; in either of which cases the writ should be brought not against him, but against the person in whose name he was seised; and if this was pleaded, it would abate the writ.<sup>4</sup> In such case he might plead, generally,

Non tenure. *nontenet*, or that the freehold was not in him. If he put himself upon the country for the truth of such a plea, and it was found against him, he would lose the land in question, as a penalty for his false plea; the same, if he said he did not hold, it

<sup>1</sup> Bract. 429.<sup>2</sup> *Ibid.* 430.<sup>3</sup> *Ibid.* 431.<sup>4</sup> *Ibid.* 431 b.

but another did. But if he admitted that he held part, and said that another held the rest, and this was found against him, he did not lose the whole, nor a part, on account of his false plea, but the suit went on, and he was to answer for the whole. He might plead that he once held the land, but that he did not at the present time.<sup>1</sup> If this was owing to an alienation before the purchase of the writ, no fraud could be objected; nor indeed, if after the purchase, provided he was ignorant of the writ. In some cases the alienation might be even after the summons, without being fraudulent; as if he went beyond sea, either before or after the purchase of the writ, not being prevented by the summons, and knowing nothing of it, and there made an alienation; but if neither of the beforementioned cases could be proved, and especially if the alienation was after the summons had been testified and proved, he was considered as the real possessor, and was to stand to the suit as tenant.<sup>2</sup>

He might plead that he held only so many acres, whereas the demandant claimed so many; upon which an inquisition might be had by a writ to the sheriff, directing him to summon four, six, or more of lawful men of those who made the view, and by them to make inquiry whether the tenant held so many or so many acres. Again, in a plea of *non teneat*, if the tenant had before confessed in the county court that he held the whole, a writ went to the sheriff, commanding him to make a record of the plea in which such confession was made.<sup>3</sup> If the demandant, after a plea of *non teneat*, made a *retraxit*, and commenced a suit against another, the tenant would not suffer any penalty for his false plea.<sup>4</sup> Exception might be made to the name of the *vill*, any mistake in which would be an incurable error.<sup>5</sup>

Another part of the writ, or count, to which an exception might be made, was the claiming the land *ut jus meum*. To this the tenant might answer, that he had *majorius jus*; *Majorius jus.* and this issue would be tried by the great assize, or duel, as the tenant pleased. It has been before shown, that the best title, in the law, was where the *jus possessionis* and *jus proprietatis* were united, which was therefore called *droit droit*; and it was a maxim, that whoever had the *jus proprietatis* ought to have the possession. *Possessio sequitur proprietatem* but *not vice versâ*. The *proprietas* might be separated from the *possessio* in this manner: Upon the death of the ancestor, the *proprietas* immediately descended to the next heir, whether he was present or not; but not being present, the *possessio* might be obtained by another, who put himself into seisin; by virtue of which the *jus possessionis* would descend to his heirs, through the negligence of him who had the *proprietas*. Thus, while the *jus proprietatis* descended on the elder brother, the younger brother might obtain seisin and die seised, transmitting to his heirs, together with the *jus possessionis*,

<sup>1</sup> Bract. 432.<sup>2</sup> *Ibid.* 432 b.<sup>3</sup> *Ibid.* 433.<sup>4</sup> *Ibid.* 433.<sup>5</sup> *Ibid.* 434.

which he himself had, a sort of *jus proprietatis*;<sup>1</sup> so that there would be two *jura proprietatis* in different persons by different descents; but one, as the descendants of the elder brother, would have *MAJUS JUS proprietatis*, on account of the priority; and those from the younger brother *minus jus*; yet the *possessio* of the latter would prevail till the former evicted them of the *jus proprietatis*.

Another plea which the tenant might plead was, that the demandant, or one of his ancestors, had released to the tenant, or some of his ancestors from whom he derived the *jus possessionis*, and quit claimed for himself and his heirs by a fine made in the king's courts;<sup>2</sup> or that the demandant or some ancestor lost the land in question, in judgment in an action *de proprietate*, as by the great assize or duel, or a jury, on which he had put himself; and these pleas were to be proved by the record of the justices.

If the demandant or any of his ancestors had been apprised of any litigation, or final concord made concerning their right, and had not put in their claim, this silence might be pleaded against the demandant to a writ brought to establish such right. The manner of making a claim was simply by the words,<sup>3</sup> *appono clameum meum*; or, what had the same effect, by commencing a suit; a fact like this being a stronger proof than a mere claim that he did not mean to abandon his pretensions. This claim was to be made pending the plea, and the making of the *cyrographum*, or before judgment, provided he was in court at the time, or in the kingdom within the four seas; and in such case ignorance was no excuse; nor, says Bracton, as it should seem, would he afterwards be heard; for if it was a fine, the time taken up by the pendency of the action afforded, at least, a month for putting in a claim; for the summons ought to be served fifteen days at least, that being what was called reasonable summons; and the *cyrographum* used not to be allowed at the return of the writ, but a day was given at fifteen days at least, when the *cyrographum* was to be taken, during all which time there was sufficient opportunity to make claim. Indeed a month was the period which Bracton says was limited for this purpose, *secundum communem provisionem regni*, and therefore he calls it the legal time for making the *cyrographum*; so that, if it was made before, it was fraudulent, and no claim need be made to invalidate it.<sup>4</sup> The place to make claim was in the king's court, at the time of passing judgment, or before.

However, there were certain causes of excuse, which would protect a party from the consequence of having omitted to make his claim; as, if at the time of the fine and making the *cyrographum*, the person who ought to make the claim was within age, or *non sanæ mentis*; if he was an idiot, born deaf and dumb, or the like. But when such person came to age, or recovered his senses, it was

<sup>1</sup> Bract. 434 b.<sup>2</sup> *Ibid.* 435.*Ibid.* 435 b.<sup>4</sup> *Ibid.* 436.

the opinion of some that he ought to make that claim then, which he could not make before; and, according to some, if a minor did not do it within a year after he came of age, he would not be excused; yet Bracton says that he was excused though he made no claim within that time, and that a claim need not be made at all, and would have no avail after judgment passed, or the delivery of the *cyrographum*. A person who was in prison at the time of the suit, or detained by such a disorder as did not allow him either to come or send, would be excused; as would also, for the same reason,<sup>1</sup> a person who was restrained by force, even out of prison. A married woman, even though she might send, would be excused, as *sub potestate viri*; so that all sorts of impotence seemed sufficient excuse; and upon this idea, a person who was *ultra mare* at the time was excused; and none of these, according to Bracton, need make any claim after those impediments were removed, if judgment was passed, or the *cyrographum* delivered.

Another case in which a party was excused, though he made no claim, was where the fine, according to the words of Bracton *ipso jure sit nullus*, as if it was made of a tenement in the possession of another person, perhaps of the person himself to whom it was objected that he made no claim, or some ancestor, and not of him (or his ancestor) who pleaded the fine;<sup>2</sup> or if the fine was made by any collusion or fraud, or in any way so to the prejudice of another as that it ought not in justice and equity to hold good. A person would likewise be excused if there was no *cyrographum*; or, if a disseisor made a feoffment and then a fine, such a fine might be revoked and made void; so if, at the time of the suit, neither himself nor his ancestors had any title to the tenement in question; or if the ancestor who ought to have made the claim was not an ancestor through whom any right could descend to the person against whom the fine was pleaded. Bracton says, that notwithstanding a fine and *cyrographum* might seem *primitus facie* to be revocable in many cases, because the person making it was only tenant for life, in dower, and the like, or because the land in question was held in villenage; yet all persons were in law bound by this judgment, and therefore, if they made no claim, they would not be excused. In short, it is declared by Bracton, that no person should be excused if he was in the kingdom, *infra quatuor maria*, and had it in his power to come or send, so that even a person *in languore* would not be excused, because he might send.<sup>3</sup> If a person was *in servitio regis*, so as he could neither come nor send, he was excused, although he made no claim. Thus stood the law upon the subject of claim to suspend the effect of a judgment or fine.

From the manner in which Bracton speaks of a fine, it should seem as if this judicial concord was entered into after a proceeding was commenced on any writ whatsoever which was grounded on

<sup>1</sup> *Ubi eadem ratio, ibi idem jus.*

<sup>2</sup> Bract. 463 b.

*Ibid.* 437.

the *proprietas*, and that it was not confined to a writ of covenant, grounded upon the breach of a supposed prior agreement and concord; it seems particularly to have been made in a writ of right, and is all along mentioned in company with a judgment therein upon the great assize or duel.

We have now dismissed the subject of real actions, through all their parts and kinds. It remains to add something <sup>Of personal actions.</sup> on the nature of process in actions personal. These, like real actions, were commenced by summons; but if a defendant omitted to appear upon a lawful summons, the contempt was treated in a different manner, for they proceeded by attachment, as appeared in Glanville's time (a).<sup>1</sup> Personal actions differed likewise in their process, according to circumstances: in some causes which from their nature would not bear delay, as where the subject was the fruits of the earth, or other things which were perishable; the *solennitas attachamentorum*, as it was called, was dispensed with.<sup>2</sup> So again, where the lapse of a benefice was apprehended, or where the injury was very atrocious, or the plaintiff deserved a particular respect or privilege, as noble persons, or merchants who were continually leaving the kingdom. But in personal actions which did not require such special favour, if the defendant did not appear to the summons, and the plaintiff offered himself in court the first, second, third, and fourth day, he was not to be waited for any longer; but, whether the summons was proved or not, so as it was

(a) The *Mirror* says, in personal actions defaults used to be punished in this manner. "The defendants were distrained to the value of the demand, and afterwards they were to bear their judgments for their default, and for default after default judgment was given for the plaintiff. This usage was changed in the time of Henry I.; that no freeman was to be distrained by his body for an action personal, so long as he had lands, in which case the judgment for default was in force, till the time of Henry III.; i.e., that the plaintiff should recover seisin of the land, to hold the land until satisfaction was made. In actions where the defendants were not freeholders, they used to be punished in this manner: first, process was to be awarded to arrest their bodies; and those who were not found were outlawed" (*Mirror*, c. iii. s. 5). Elsewhere it is said personal actions bear their introduction by attachments of the body; but not by summons and mixed actions; first by summons, and afterwards by attachments. The difference was, that where the defendant had land, the seizure of that would be sufficient coercion to appear; but where he had no land, then the person was to be seized. The passage in the *Mirror*, however, it is to be observed, was written after the time of Henry III.; and the above allusion to an alteration in the law is no doubt to the statute of Malbridge, 51 Hen. III., after Bracton's time, allowing that accountants who had no lands might be attached by their bodies, i.e., arrested at common law. It should seem by the *Mirror* that defendants in personal actions could be distrained by their bodies until the time of Henry I., and then if they had no lands. But the usage must have altered in order to require the statute of Malbridge: so much did the law fluctuate in the earlier ages of our law. As regards summons, it has already been observed, the period allowed for appearance varied with the nature of the action, and was shorter in personal actions than real actions; and Fleta says it was shortest in mercantile causes: "*causae mercatorium*" (lib. vi. c. vi.) It is to be observed that attachment might be of the *person* or of the *goods*; and thus the *Mirror* speaks of a man being distrained by his body, i.e., arrested. In Glanville's time, it appears that in real actions the land was seized, and the parties might be attached by their bodies for contempt; but nothing is said as to personal actions.

<sup>1</sup> *Vide ante*, 121.

<sup>2</sup> Bract. 439.

not openly denied, he was to be attached by pledges. Upon which the entry on the roll was thus: *A. obtulit se quarto die versus B. de placito*: then the substance of the writ was added, and it went on, *et B. non venit, et summomitus, &c., Judicium, Attachitur quòd sit coram, &c.* The writ of attachment was—*Pone per radium et salvos plegios B. quòd sit coram, &c., ad respondendum de placito*; and then followed the substance of the writ as upon the roll. The following instances of such entries upon the roll are given by Bracton: *De placito quare non tenet ei conventionem inter eos factam, or faciem inter eos factam de, &c.*—*De placito quia warrantizet ei tantum terram cum pertinentiis, &c.*—*De placito quare non facit ei consuetudinem et certa servitia, quae facere ei debet, &c.*—*De placito quòd reddat ei tantum pecuniam quam ei debet et injustè detinet, &c.*—*De placito quare idem B. simul cum aliis venit ad domum suam, et ibi did such* Attachment.

a trespass, *contra pacem nostram*. Thus the attachment pursued the nature of the original writ, and at the end was added this clause: *Ad ostendendum quare non fuit coram, &c., sicut summomitus fuit*: or if he had essoined himself to a particular day, then, *ad ostendendum quare non servavit diem sibi datum per essoniatorum suum, &c.*, to which he was to answer before he answered to the principal point; and if he could not excuse himself, he was to be *in misericordia* for his default.

If he did not appear after this first attachment, then, upon the plaintiff offering himself, he was to be attached by better pledges, to answer on another day. This was called *aforciamantum plegiorum*, and was in the nature of distress for service, where, if the party appeared not at the first distress, more cattle were taken *pro aforciammento districtionis*.<sup>1</sup> The entry on this occasion was—*A obtulit se quarto die versus B. de placito, &c.*, as before; *et B. non venit, et aliàs fecit defaultum postquam fuit summomitus; et ita quòd attachiatus tunc fuit per C. et D. Judicium, Ponatur per meliores plegios quòd sit, &c.*, upon which there issued a second attachment, in which was likewise contained a summons against the former pledges, to show cause why they did not produce the defendant, as they had engaged to do. If neither the defendant nor pledges appeared to this writ, all the pledges were *in misericordia*, and not the defendant; but then all the defaults fell upon the defendant, as if he had found no pledges at all; and a writ issued, *quòd sit ad audiendum judicium suum de pluribus defaultis*; and from that day all aforcement of pledges ceased. If the defendant appeared to the second attachment, then only the first (and not the second) pledges were to be amerced, unless they showed cause why they did not produce him at the first attachment. However, though the defendant was not to be amerced, but summoned to hear judgment on his defaults, yet Bracton thinks it was otherwise in regard to a plaintiff who had found pledges *de proseguendo*, and did not prosecute his suit;

<sup>1</sup> Bract. 439.

for, according to him, they were all to be amerced, as well the principal as the pledges.

If, at the first day of summons and attachment, neither defendant nor plaintiff appeared, the plaintiff did not, however, lose his writ. When the defendant had been attached by better pledges, and did not come to his day, nor within the fourth day, and the plaintiff did,<sup>1</sup> the entry was thus: *A. obtulit se quarto die versus B. et B. non venit, &c., et plures fecit defaultas, ita quòd primò attachiatus fuit per C. et D. et secundò per E. et F. et idèd omnes plegii in misericordiâ*; and then the process above alluded to issued against the defendant, commanding the sheriff, *quòd habeas eum, &c., corpus B. ad respondendum A., de placito, &c., ad audiendum judicium suum de pluribus defaultis, &c.* If he came at the day, and could not save his defaults, he was to be amerced for them, and then to answer to the action. If he did not appear, but concealed himself, or, as they called it, *latitaverit*, so that the sheriff returned, *he was not to be found in his bailiwick*; then the entry was thus: *A. obtulit se quarto die versus B. de placito as before; et B. non venit, et plures fecit defaultas, ita quòd præceptum fuit vicecomiti, quòd haberet corpus ejus; et vicecomes mandavit, quòd non fuit inventus in ballivâ suâ, et idèd vicecomes distringat eum per omnes terras et catalla, quòd sit ad, &c.,* upon which there issued a writ of *distringas* against his lands and chattels. If he did not appear to this writ, his default was punished by another writ of *distringas*, commanding the sheriff to distrain his lands and goods, *et quòd sit securus habendi corpus ejus* at another day. If he still made default, the next *distringas* was, *ita quòd nec ipse, nec aliquis pro eo, nec per ipsum manum apponat in terris, tementis, bladis, nec in aliis catallis*. If he still made default, the next *distringas*, if it could be so called, was, *quòd capiat omnes terras et omnia catalla in manum domini regis, et capta in manum domini regis detineat, quousque dominus rex aliud inde præceperit, et quòd de exitibus respondeat domino regi*: and beyond this there was no further process *per terras et catalla*; they being both taken into the king's hands by the sheriff, who was to answer for the profits to the crown.

What step was to be taken by the plaintiff who had suffered all these delays? For it was hard that, after all, he should lose the effect of his suit. Bracton thinks that in this there was a difference between actions upon a contract for a sum of money, and for a trespass. In the former, he thought it would be right to adjudge to the plaintiff a seisin of the chattels to the amount of his demand, and to give him a day, and summon the defendant; when, if he appeared, the chattels should be restored, upon his answering to the action: if he did not appear, he should not be heard upon the matter, but the plaintiff should become lawful owner thereof. But if it was an action of trespass,<sup>2</sup> then he thought, the justices should

<sup>1</sup> Bract. 440.

<sup>2</sup> *Ibid.* 440 b.

estimate the damage sustained; and the rents and chattels of the fugitive being valued, a portion should be taken into the king's hands to the amount of the damage, as a penalty on the defendant.

Should the defendant, however, not be found, nor have any land or goods, he did not wholly escape the resentment of offended justice; for whether it was an action for money or a trespass, the defendant was to be demanded from county to county, at the suit of the plaintiff, till he was outlawed. Persons so outlawed were not, upon their return, or being taken, to lose life or limb, as those outlawed for crimes; but were condemned to perpetual imprisonment, or to abjure the realm.

It sometimes happened that the sheriff did not execute the attachment nor return the writ; and then, upon the plaintiff offering himself, the entry was thus: *1. A. obtulit* <sup>the writ.</sup> *se quarto die versus B. de placito, &c., et B. non venit, et preceptum fuit vicecomiti, quod attachiaret eum, quod esset ad talem diem, et ipse vicecomes inde nihil fecit, nec breve quod ei inde venit, misit; et ideo preceptum est vicecomiti, sicut alias, quod attachiaret eum, quod sit ad &c., et quod ipse vicecomes sit ibi auditor judicium suum de hoc quod predictum, &c., non attachiavit, nec breve quod ei inde venit, misit, sicut ei preceptum fuit.* Upon this there issued an *alias* attachment: *Præcipimus tibi, sicut ALIAS tibi præceperimus, &c.*<sup>1</sup> If the sheriff did nothing upon this writ, nor showed any sufficient excuse, he was amerced for his contempt, and was commanded a third time to attach the party: *Præcipimus tibi, sicut SEPIUS præceperimus, &c.*

Sometimes the sheriff sent an excuse for not executing the writ. He would sometimes return, that the writ came too late to be executed; that the party was not to be found in his bailiwick; that he was wandering from county to county, and had no certain residence; that he had no lands or chattels by which he might be distrained; and many other excuses might be feigned. Again, should the sheriff err in the sort of attachment; as when he was to take pledges should he make a distress; or, instead of taking the person, should he admit to bail; in all such cases it was usual to make an entry of the return, and to specify it in the writ that issued in consequence thereof: as, for instance, *et B. non venit, et vicecomes mandavit, quod non attachiavit eum, quia recepit breve tum tardè quod preceptum domini regis exequi non potuit*; and if it was proved that he received the writ in good time, or in the county court, and might have executed it, the record went on, *Et testatum est, quod istud recepit satis tempestivè* (or *in comitatu ubi attachiandus præsens fuit*), *et ideo, præcipiatur quod, &c.* Upon this a writ issued, commanding him to attach the party,<sup>2</sup> and appear himself to answer for his default; and if he failed in either, he was *in misericordiâ*. A sheriff was sometimes excusable for not executing process by reason of some liberty which he could not

<sup>1</sup> Bract. 441.<sup>2</sup> *Ibid.* 441 b.



enter, because the lord thereof had the *retorna brevium* therein. In such case, the sheriff was to command the bailiff of the liberty to execute it; and if he did not do it, the sheriff was excusable before the justices, by making a return, *quod praeceptum est ballivo*. When the bailiff thus failed in doing his duty, the sheriff was then commanded not to omit doing it by reason of that liberty; under which special warrant the sheriff had an authority that did not generally belong to him. The entry upon the record was, *Et vicecomes mandavit, quod praecepit ballivis libertatis, et ipsi nihil inde fecerunt, et ideo praeceptum fuit vicecomiti, quod NON OMITTAT PROPTER LIBERTATEM quam, &c.*, and there issued a writ *quod non omittas*, containing an attachment, *distringas, habeas corpus*, or whatever the necessary process might be, by which also the bailiff of the liberty was summoned to show cause for his neglect.<sup>1</sup>

If the sheriff was resisted in the execution of this writ by the bailiff or lord of the franchise, there issued another *non omittas*, with a clause authorising him to go, with some sufficient knights and free men of the county, and take the bodies of such as resisted them, and keep them in prison till the king's pleasure was known concerning them. The lord of the liberty was likewise attached to appear and answer for the offence; and if he could not deny it, his liberty was seized into the king's hands for such an abuse of it.

A sheriff might say that the person was a clerk, and claimed the privilege of a clerk not to find pledges, and that he had no lay fee by which he could be distrained. It seems from Bracton, that in such case they did not proceed directly against a clerk, particularly in trespasses; but the course was to resort to the archbishop, bishop, or other in whose diocese the person to be attached resided, or had an ecclesiastical benefice, and require him, *quod faciat, &c., clericum venire*.<sup>2</sup> If the bishop neglected to obey this writ, he was summoned to answer for his default; to which if he made no appearance, there ran against him all the *solennitas attachmentorum*, as in other distresses, and he was immediately distrained by his barony:<sup>3</sup> and if neither the bishop appeared nor the clerk, then they proceeded by judgment of the court against the clerk, who was arrested and detained till he was demanded by the bishop. At any rate, it was expected, a bishop who held a barony of the crown should obey the king's writs; and if a clerk did not appear, the bishop might bring or send an excuse why he had not the clerk according to the requisition of the writ; he might say that he had no benefice in his diocese by which he could be distrained; or if he had a benefice, he might say that he was a student at Paris beyond the sea, that he did his utmost in sequestering him by his prebend and other benefices, and could do no more in the way of compulsion. This would be a complete justification for the bishop, and all process would cease till the clerk returned, and could be taken; and then, if the bishop omitted, the sheriff might proceed as above mentioned.<sup>4</sup>

<sup>1</sup> Bract. 442.<sup>2</sup> *Ibid.* 442 b.<sup>3</sup> *Ibid.* 443.<sup>4</sup> *Ibid.* 443 b.

It was said before, that in some personal actions the *solemnitas attachiamentorum* was not to be observed, and this was in several cases of privilege; as, in addition to those that have been already mentioned, where the plaintiff was a crusader or a merchant, whose affairs demanded despatch; where there was some urgent necessity; as in assizes of darrein presentment, *quare impedit*, and *non permittit*, lest the plaintiff should incur the lapse of six months; where the subject in contest was a perishable article, as ripe fruit; or, in an action of trespass, where the injury was atrocious, and against the king's peace; where regard was to be had to the quality of the person injured, as the king, queen, or their children, brothers, sisters, or any of their relations or kin; in any of the above cases, it was usual, in the first instance, to have a writ to the sheriff, *quod habeat corpus*, &c., *ad respondendum*. But this writ against the body, instead of the clause *ad audiendum judicium de pluribus defaltis* (which would have been absurd), had one, containing the cause wherefore the formality of attachment was dispensed with; as, *Præcipimus tibi, quod, omni occasione et dilacione postposita, propter privilegium mercatorum, quorum placitum instantiam desiderat, habeas*, &c., and so in other cases. But, notwithstanding this intention to avoid delays, the defendant might have an *essoïn de malo veniendi*, before he appeared.<sup>1</sup> In capital cases, there was no attachment, but that *per corpus*: and any one, with or without a precept, might arrest such an offender.<sup>2</sup>

In mixed actions, as those for dividing a common, *de proparte sororum*, of *partition*, and the like, the usual process was, distress real, and not distress personal.

Thus far Bracton speaks of the commencement of mixed and personal actions; but, notwithstanding the full manner in which he has treated the whole proceedings in real actions, he leaves these without any further discussion.<sup>3</sup> The small proportion that personal property bore to real, in these days, might be a reason why the remedies provided for the recovery of it, should have undergone very little consideration (*a*). Consistently with the inferior light in which personal property was held, it is probable that the

(*a*) There is a whole chapter upon contracts (*c. ii. s. 27*), which are expounded very fully, whether as to their nature, simple contract or deed, or their subject matter, leases, bailments, and the like; and it is said, "according to the nature of the actions, the forms of the remedial writs are adopted." But then, as the remedy would in most cases be far more convenient in the county court, the only remedial writ would be "justicies," to the sheriff to empower them to hear the case in that court. In the vast majority of cases, this would be the most convenient course; and hence little is said about the procedure in such actions in books which professedly treat of proceedings in the king's superior courts, which were, for the most part, confined to suits relating to real property. The *Mirror* shows that there were personal actions, with procedure as well adapted to them as those in real actions; and in the *Mirror* they are treated of as fully. The reason why the author had not found so much about them in Glanville or in Bracton was, that those authors—both of them judges in the king's superior courts—confined themselves to proceedings before those courts, and their proceedings were almost entirely in real actions. Because (as has been

<sup>1</sup> Bract. 444.<sup>2</sup> *Ibid.* 444 b.<sup>3</sup> *Vide ante*, 459.

nature of personal actions had not been much refined upon. We shall see, in the following part of this history, how they gradually grew into notice, and at length became equally important with real actions. It is to be lamented that our author passes over with the same silence the redress to be obtained by a writ of error; the practice of which must be collected from authorities of a later period.

seen), originally, the primary jurisdiction in all actions was in the county courts, whose jurisdiction was not limited, as that of the courts baron was, to sums under forty shillings, but extended to any amount;—because there were no other courts of primary and ordinary jurisdiction. And though a practice had arisen of requiring the king's writ of justices to the sheriff, to give the county court jurisdiction in cases above that amount; yet it is probable that, for many reasons, the cases which concerned mere personal rights of action continued to go into that court, and were not removed thence, so often as causes which concerned the inheritance. Moreover, some actions, as in debt, in which wager of law—a usage arising out of the old Saxon system of compurgators—was allowed, and which actually, in law, survived to our own times (although, of course, obsolete ages ago)—was one which, if it were to be resorted to, would be far more conveniently resorted to in the county court, where all the compurgators would be well known, than in the *curia regis*. Added to this, the nature of personal actions generally required a greater degree of speed in the proceedings than real actions, in which speed was not of great importance, and which required deliberate judgment. That personal actions were not only numerous, but far more numerous than real, will be manifest upon a little consideration, and is apparent from many passages in the *Mirror*. The matters and transactions out of which they arose were of daily and hourly occurrence; whereas suits to recover real estates must, from their nature, be far fewer in number than cases of trespass, for instance, for trespass or distress, would occur every day; while actions to recover land would be in comparison few. The *Mirror* mentions many classes of personal actions, and treats of them so fully as to show that they were common. For instance, there is a whole chapter upon wrongful distresses, which were very frequent in those times, and of which the *Mirror* says, “An action granted upon personal trespass, occurreth to people wrongfully distrained; and it is said that if the distress is carried away (out of the county), the cognizance belongs to the king's court, which could grant replevin; but to hasten the remedy, sheriffs and hundredors had power to take sureties, and deliver the distresses, and hear and determine the complaints of the wrongful distress.” And it is obvious that these were, for many reasons, cases fit for the local courts. And so, for various reasons, of the greater proportion of personal actions. The *Mirror* mentions various classes of such actions in different passages. Thus, in one place, it speaks of actions of account, and of leading away distresses (c. iv. s. 5); and in another place, of actions where one denies his gift, his bailments, his deed, or other kind of contract (c. iii. s. 23); and in another place, of obligations and covenants (c. ii. s. 32), and trespasses, and taking of goods (c. i. s. 24).

## CHAPTER VIII.

### HENRY III.

*The Eyre—The Jury—Capitula Itineris—Of Lese-Majesty—Who to judge thereof—Of Homicide—The Offi. of the Coroners—Imprisonment and Bail—Of Outlawry—at the King's Suit—Reversal of Outlawry—Of Murder—Presentment of Englishers—Abjuration—Ordeal goes out of Use—The Duel—Appeal of Homicide—Exceptions thereto—Proceeding per Formam Patrie—Of other Appeals—Of Theft—Of Provers—Of Votum Nuncium—Dies Communes in Banco—Statute of Marlbridge—Distresses—Writ of Entry in the Post—Legatine and Provincial Constitutions—The King and Government—Statutes—Bracton—Miscellaneous Facts.*

WHAT has been said of our criminal law in the reign of Henry II. was confined to such pleas as related to the king's crown and dignity. We shall now be enabled to treat more fully of this subject in all its parts. As criminal justice was most commonly administered in the country before the justices itinerant,<sup>1</sup> it may be proper to give some account of the course of proceeding there; after which we may go on to the consideration of crimes, as to their nature and punishment; with the method of pursuing and prosecuting offenders, from the time of the fact committed to their condemnation in court (*a*).

Previous to the coming of the justices itinerant, there issued a general summons, as was before shown<sup>2</sup> for all persons to attend at a certain place and time; which time was to be at least fifteen days from the proclamation of the summons. The eyre.

(*a*) The author here follows Bracton, who speaks only of justices itinerant; and he appears to have regarded the justices itinerant and the justices in eyre as the same; but the former were at first appointed to go their circuits yearly, or twice a-year; whereas the latter, there is reason to believe, went once in seven years. It appears that, towards the latter part of the reign, the justices itinerant were restrained from going oftener than once in seven years (*Lord Littleton; Hen. II.*, vol. ii. p. 208); and in the histories of the contemporary chroniclers, it is stated that the people actually remonstrated against their coming oftener. The explanation of this is, that their commissions were not merely for the administration of justice, but also embraced the collection of various branches of the royal revenue—fines and amercements, talliages and forfeitures; and they often pressed their exactions so that they were dreaded as oppressors rather than hailed as protectors. The *Annals*, under the head of "Justices in Eyre" (not mentioning justices itinerant), says that it was ordained that kings or their justices should go circuit every seven years through all the shires, to hear and determine all pleas, receive the rolls of sheriffs, bailiffs, &c., and see if any had erred, either in the law or to the damage of the king, and those things which they found not determined, they should determine them; and that in the eyre they should inquire of all offences which belonged to the king's suit and jurisdiction—i.e., involved fines or amercements at his suit. And they were to inquire of all manner of pleas and presentments after the last eyre taken and received—the first to inquire, hear, and determine the articles presented in the last eyre

<sup>1</sup> *Vide ante*, vol. i. 201.

<sup>2</sup> *Ibid.* 403.

When the justices came, the first step to be taken was to read the *writs* or commission under which they derived their authority. After this, if the justices pleased, one of them, being, as Bracton says, *major et discretior*, was openly to propound the occasion of their coming, to enlarge upon the utility of the institution of *itineræ*, and the benefits that followed from keeping peace and good order; he was particularly to notice the violation of justice committed by murderers, robbers, and burglars; and inform the whole assembly that the king commanded all his liege subjects by their faith, and as they would preserve their own property, to give every advice and assistance towards repressing such and the like offences.

After this, says Bracton, the justices were to withdraw into some private place; and call to them four, or six, or more of the *maiores comitatûs*, who were called<sup>1</sup> *busones comitatûs*; being persons on whom the rest depended, and by whom they were governed. With these the justices were to converse, and show how provision was made by the king and his council for all persons, as well knights as others, being fifteen years of age, to make oath that they would not harbour any outlaws, murderers, robbers, or burglars, nor collude with those who did; and, if they knew of any, that they would cause them to be attached, and report it to the sheriff and his bailiffs; that they would follow every hue and cry with their family and men; that they would arrest all suspected persons, without waiting for the mandate of the justices or sheriff, and make report to the justices or sheriff of what they had done. These principal persons of the county were to swear to observe all this; and moreover, that if a person came into a town to buy victuals which were suspected to be for the maintenance of malefactors who were harboured in the country, they would arrest the party, and deliver him to the justices or sheriff; that they themselves would not receive any stranger into their houses by night; or, if they did, that they would not permit him to go before it was broad day, and then not without the testimony of three or four neighbours.<sup>2</sup>

After this conference with the principal people of the county,

which were not ended, and afterwards to determine matters since then (c. iv. s. 21); and it is elsewhere said to be an abuse that a man should have an action personal from a longer time than since the last eyre (c. v. s. 7); and it appears, also, that crimes were not inquired into if committed before the last eyre. Thus, then, it seems clear, that justices 'in eyre' (a phrase probably derived from the old word *eyrer*, to go, from the Latin *ire*, and akin to the Latin word, *iter*, used in Bracton), meant justices who went once in seven years to hear and determine pleas of the crown, and all other matters which justices itinerant would hear. Britton also, who wrote after the end of this reign, has a heading, "De Eyres:"—"Quant a nos venes al eyres de nos justices."

<sup>1</sup> The anomalous appellation of *busones* is to be met with nowhere but in this passage of Bracton. Sir Henry Spelman says, he had seen a MS. that was written *barones comitatûs*; if so, it possibly means the *barones majores*, or lords within the county. The distinction between *barones majores* and *minores* had become more important in the days of Bracton than it had been before; for it is supposed that the latter were, about that time, excluded from the legislature, writs of summons being directed only to the former. Vide Spelman and Du Cange voce *busones*.

<sup>2</sup> Bract. 115 b. 116.

the justices, we may suppose, returned into the open court, to attend to the rest of the business. The next step was the calling over the serjeants and bailiffs of hundreds, each of whom was to swear to choose out of his hundred four knights, who were to come immediately before the justices, and make oath that they would elect twelve other knights; or, if knights could not be had, twelve *liberos et legales homines*, who were no appellors, nor appealed, nor suspected of breach of the peace, or the death of a man, or other offences, and such as were well qualified to despatch the king's business on that occasion. The names of these twelve were immediately to be inserted in a schedule, which was to be delivered to the justices. As the twelve of each hundred appeared, one of them took the following oath: "Hear this, ye justices, that I will speak the truth of that which you shall command me on the part of our lord the king; nor will I, for any thing, omit so to do, according to my ability; so help me God, and these holy gospels;" after which every one was to swear separately for himself. "The oath which John here has taken, I will keep on my part; so help me God, and these holy gospels." When they had all sworn in the above manner, the *capitula itineris* were read to them in order; and when those were gone through, the justices informed them, that they were to answer in their verdict, separately and distinctly, upon every article thereof, and were to have their answer there at a certain day. Besides this, they were to be told, privately, that if any knew of any suspected persons in his hundred, he should instantly take them if they could be found; if not, their names were to be conveyed to the justices, in a schedule, privately, that they might not have notice to escape; upon which the sheriff would be commanded to take them, and bring them before the justices.

These articles of inquiry, called the *capitula itineris*, were not always the same, but differed as times or places required. We have before given some specimens of the *capitula* in the preceding reigns;<sup>1</sup> the following are the articles of inquiry mentioned in Bracton. The first was of the old pleas of the crown begun before the former justices, but not determined; then of the new pleas of the crown that had arisen since (for such as had happened before the former iter, and had not been prosecuted, could not now be inquired of; and, should any one be charged with an old crime, he might plead such matter in discharge of himself); of the perjury of jurors at a former iter; of those *in misericordiâ regis*, but who had not been yet amerced; of the king's wards; his vacant churches; his estreats; his serjeanties, and purprestures on his land; of measures and weights; of sheriffs and other bailiffs who held pleas of the crown; of usurers deceased, and their chattels; of the chattels of Jews killed; of counterfeiters of the coin; of burglars, fugitives, outlaws; of those who had not made suit after offenders; of new

<sup>1</sup> *Vide ante*, vol. i. 202.

pretended customs; of rewards for releasing distresses; of those who held plea of provors without lawful authority; of escape of thieves; of wreck; of offenders in parks; *de rapinis ancl prisis*; of those who, having no liberty, obstructed the entrance of bailiffs on their land; of bailiffs and sheriffs giving favour, or holding plea *de vetito namio* without the king's writ, or fomenting suits, or taking bribes; of hundreds lett to farm, and their value; of sheriffs and bailiffs discharging on pledges persons excused of the death of a man, for money, or imprisoning those indicted of larceny, who were by law repleviable, or raising amercements, or making unlawful distresses; of such who did not produce those they had been pledged for before the justices; of warrens made without lawful authority; of treasure trove; of felons hanged, and the value of their lands and goods. These seem to have been the principal and most usual articles to be inquired of by the jurors at this time.<sup>1</sup>

Having thus shown the manner in which business was begun in the eyre, we shall for the present take leave of it, and consider the nature of crimes, and the course of bringing criminals to justice. This will carry us to the inferior courts of the sheriff and coroners, and at length bring us back to the eyre, where these matters were finally determined.

The crime which first claims our regard is that of *læse-majesty*; which contained in it several species of offence. One of *læse-majesty*. of them has been before described from Glanville;<sup>2</sup> and was, when a person attempted anything against the king's life, or to raise sedition against him, or in the army, though what was designed was not brought to effect; and all those who gave aid, counsel, or consent thereto, were equally involved in the guilt. A charge of this kind might be brought by any one, even by an infant; but the party accused, in such case, was to be attached till the infant came of age. The accuser, however, must himself be no offender; for if he was an acknowledged thief, or outlawed, or convicted, or, says Bracton, *to be convicted* of any sort of felony, he was not admitted to accuse another; nor were accomplices in the guilt ever admitted to bring a charge of *læse-majesty*. The law required an accusation of this crime to be made with all expedition. A person, who knew another to be guilty was to go instantly, says Bracton, to the king himself, if he could; or send, if he could not go; or to some *familiaris* of the king, and relate the whole matter. This was to be done instantly; for, according to the same authority, he was not to stay two nights nor two days in one place, nor to attend the most urgent business of his own; he was hardly permitted, says he, to turn his head behind him; and the dissembling the charge for a time by silence, made him a sort of accomplice, and betrayer of the king; and afterwards, should he prefer his accusation, he could not by law be heard, unless he could show some very good reason for his delay.<sup>3</sup>

<sup>1</sup> Bract. 116, 116 b., 117, 117 b.

<sup>2</sup> *Vide ante*, vol. i. 195.

<sup>3</sup> Bract. 118 b.

If this charge was made upon public fame, the loss of life and the forfeiture of his inheritance followed, as in case of an appeal; though in Glanville's time it seemed to have been otherwise.<sup>1</sup> If the prosecution was by an appellant, he was to state the charge, with the time, hour, and place: and conclude, *et hoc ego, iuxta considerationem curie, disrationare paratus sum*. Upon this the duel was awarded, if the appellee simply denied the fact: but he might, if he pleased, make certain answers, which must be determined before the duel could be awarded. He might object any of the points before-mentioned, as requisite to qualify a person to make the charge; to all which the appellant might reply, and the appeal might be decided on such collateral inquiry.<sup>2</sup>

It is made a question by Bracton, who was to sit in judgment upon and decide such points of law. It could not be who to judge the king, says our author, for then he would be both thereof, prosecutor and judge; nor his justices, for they represented him. Bracton therefore thinks that the *curia et pares*, that is, the justices together with the *pares*, were to be judges in all cases of life and limb, and disherison of heir. There could be no doubt, especially since *Magna Charta*, whether the *pares regni* were to be tried by their peers; Bracton therefore must here be understood as speaking of commoners, to whom the *seclatores* of the county and other courts were *pares*, and judges in such courts. But these, we have seen, were never *pares curie* in the king's courts. And indeed the manner in which he gives this opinion is an evident mark of a different usage having subsisted, and that it was not precisely agreed in what instances to recur to this ancient common-law method. This idea of Bracton might be executed by associating certain persons of the county in the commission with the justices (as we have seen was required to be done in the commission of assize),<sup>3</sup> who would be thus at once constituted *pares curie*. The remainder of this passage in our author, as it contains the opinion then entertained upon this point and the award of the duel, deserves notice. There was to be a distinction according to the fact on which the appeal was grounded, whether it was felony or trespass; for every trespass, says he, is not felony, though every felony contain in it a trespass. If it was a felony, then the words of the appeal were to be weighed, and the matter examined into; as whether the appellee would wage the duel, or plead some of the points above mentioned to bar the appeal; and if the duel had been waged without such examination, it might be *devadiatum*, or retracted. If it turned out to be rather a trespass than a felony, the duel was barred; and then it was to be inquired of what degree the trespass was. If it was *levis*, and the judgment would be only for a slight pecuniary penalty, the justices might judge of it without the *pares*; but if it was *gravis*, and very near to that which would have produced a disherison, and actually required a redemption to be paid, there the

<sup>1</sup> *Vide ante*, vol. i. 197.<sup>2</sup> Bract. 119.<sup>3</sup> *Vide ante*, vol. i. 246.



*pares* were to be associated to the justices, lest the king, by himself or his justices, without the *pares*, should be both *actor* and *judex*.<sup>1</sup>

At a time when offences of læse-majesty were so undefined, and accusations of that crime were large and general, it was almost always necessary to examine the matter before it went to the decision of the duel, to see whether it was a felony or a trespass only (as either of those might be an offence of læse-majesty), and whether that or some other was the proper mode of trial. The associating certain *pares curiæ*, as a check upon the justices, was a refinement which, however, does not seem to have been the established and universal practice; for the opinion is advanced by Bracton with a sort of apprehension that every one did not agree with him: *sine præjudicio melioris sententiæ*.<sup>2</sup> We see that læse-majesty was not the description of any specific offence, which was attended with a punishment peculiar to itself; except that when it was also a felony, the forfeiture went to the king, and not to the lord.

Another species of læse-majesty, and that which, as it produced death, may be reckoned among the higher species, was the *crimen falsi*; at least that sort of falsification that affected the king's crown; as falsifying the king's seal in signing charters or writs; or making charters or writs, and putting forged seals thereto. Another offence which was a sort of *crimen falsi*, and which affected the king's crown, and was followed by death, was the making of false money, or clipping that which was good. This is the first mention of coining being treated as a crime of læse-majesty.<sup>3</sup>

The fraudulent concealment of treasure trove is considered by Bracton, as it had been by Glanville,<sup>4</sup> to be a high presumption against the king's crown and dignity: this was to be inquired of by the country. Treasure which was found in the earth without an owner, belonged to the king, as being *nullius in bonis*. So was *derelictum*, or *wreck of the sea*, which being thrown overboard was abandoned by the owner; though *wreck* more properly meant what was cast on shore after the destruction of a ship, where there appeared no marks by which the owner might be known, as a dog, or the like. There is no mention that an infringement of this royalty was deemed a crime of læse-majesty, though that of treasure-trove was. To violate any of the laws *enacted and sworn to*<sup>5</sup> for the public benefit of the realm, was considered as a high presumption against the crown and dignity of the king; in which case there was a corporal punishment inflicted on the transgressor, as the pillory, or tumbrell, with a consequent infamy, and sometimes a pecuniary penalty and abjuration from the town where the offender lived, according to the nature of the offence, and, probably our author means, according to the particular directions of the act which had been violated:<sup>6</sup> though it may be observed, that it does not appear to have been

<sup>1</sup> Bract. 119.

<sup>4</sup> *Vide ante*, vol. i. 198.

<sup>2</sup> *Ibid.* 119 b.

<sup>3</sup> *Leges statuta, et jurata*.

<sup>5</sup> *Ibid.* 119 b.

<sup>6</sup> Bract. 120.

usual in those times, nor long after to affix in the body of an act, these or any other *specific* punishment to the breach of it.

The crime of homicide partly concerned the king, whose peace was infringed, and partly, as Bracton expresses it, the person who was killed. Homicide might be committed Of homicide. from four causes; it might be *ex justitia*, *necessitate casu*, or *voluntate*. The first was when any one was killed by sentence of a court, and in the forms of law; which was so far from an offence, as to be highly justifiable; though it became an offence, if the due order and course of the law was not observed. Homicide by necessity was, when it was inevitably necessary to kill the party, in order to defend one's person and property; for if the necessity was not inevitable, the fact was accompanied with the guilt of homicide. Accidental homicide, or *per infortunium*, was, when a stone was thrown at a bird, or some other animal, and a person passing by unexpectedly was struck and killed by it; or when a tree, which was cutting down, fell upon somebody. But here a distinction was made between a lawful and an unlawful act; as, if the stone was thrown towards a place where people were accustomed to frequent, or not; if a person when cutting down the tree, called out, and gave notice, in proper and reasonable time, for any one to escape. So if an act was, in the common course of things, lawful and proper; as if a master did not exceed the usual bounds in correcting his scholar, whatever was the event, no homicide could be imputed. If the act was unlawful, or, being lawful, was done without due caution, it would be imputed as a crime. Voluntary homicide was, where any one, of certain knowledge, and by a premeditated assault, in anger, or hatred, or for gain, killed any one, *nequiter et in feloniam*, against the king's peace. This crime was sometimes committed in the presence of others, sometimes without any one seeing it, and then it was called *murdrum*, as in Glanville's time.<sup>1</sup>

It was held at this time, that if, after the factus was formed and animated, any one struck a woman and so caused an abortion, or even if anything was given to procure an abortion, it was homicide. If a quarrel ensued between several persons, and one was killed, though the person who struck the blow was not known, yet they who held him while he struck, those who came with a bad intention, and even those who only came to counsel and assist, were all guilty of homicide; nor was he deemed entirely guiltless who could have rescued the deceased from death, and neglected so to do.<sup>2</sup> It was held, that an infant and a madman should be excused from the pain of homicide.<sup>3</sup>

In the two following cases the law is thus laid down by Bracton. If a man killed a thief by night, the party killing would not be liable to any punishment, provided he could not have saved himself without so doing. If a person killed one who was a *hamsoken*, as they then called it, that is, a housebreaker, and the killer was standing on his defence, he was not to be prosecuted.<sup>4</sup>

<sup>1</sup> *Vide ante*, vol. i. 198.

<sup>2</sup> Bract. 120 b. 121.

<sup>3</sup> *Ibid.* 136 b.

<sup>4</sup> *Ibid.* 144 b.

As a person committed felony in killing another, so might he commit felony in killing himself; and this was called *feloniâ de seipso*. Thus if a person charged with a crime, as one taken for homicide, or in manifest theft, or outlawed, or, in short, apprehended for any crime, and through fear of its consequences, killed himself; such a person was considered as corrupted in blood, for it was taken as amounting, in effect, to a conviction. But those who laid violent hands on themselves, when under no charge for any offence, were not to forfeit their goods nor inheritance like the former, because, as there was no precedent felony, there could not be a constructive conviction; though, says Bracton (in contradiction, as it should seem, to what went before), if a person *tadio vite, vel impatiëntiâ doloris*, killed himself, however his inheritance might be saved, he yet forfeited his movables. Again, if a man in the endeavour to do some hurt to another, killed himself, the felonious design he meditated against another would be punished in himself, and his inheritance was by law forfeited. Should a madman or an infant commit any felony *de seipso*, they were exempted from all sorts of forfeiture, unless, indeed, a madman did the fact in some lucid interval.<sup>1</sup>

Having said thus much of the crime of homicide, we shall make a little digression to examine the method directed by the law to be pursued on the death of a man, in order to bring the offenders to justice. The principal agents in this were the *coroners*, who were properly so called, from the part they took in the prosecution of those offences which concerned the *coronam regis*. It was the duty of the coroners, as soon as they were called upon by the king's bailiff, or some good men of the country, to go to the body of the deceased in all cases, whether the death was occasioned by a wound, by drowning, by suffocation, by accident, or by whatsoever cause, if it was a sudden death; and as they went thither, they were to command the four, five, or six next towns to appear before them, and upon their oath make inquiry concerning the death. They were to inquire how the death happened, who were present, who were principals, who were any ways assisting or consenting thereto. Those who were in this manner found guilty, were immediately, if present, to be delivered to the sheriff, and committed to prison; and all those who were found in the house with the deceased, though not-guilty, were to be attached till the coming of the justices, and their names enrolled in the coroners' rolls. If the body was found in a field, the finder, in like manner, was to be attached. They were to inquire whether the deceased was known, where he lodged the last night, and the host and all his family were then likewise to be attached. If any one fled on account of the death, and was suspected of being guilty, the coroners were to go to his house and inquire what chattels, corn, and land he had, and cause it all to be appraised, and de-

<sup>1</sup> Bract. 150.

livered to the township, which was to answer for the value thereof before the justices. After all this, and not before, the body might be buried; and if it was buried without such inquisition and view of the coroners, the whole township was to be *in misericordia*. If a person was drowned, the boat out of which he fell was to be appraised; and, in all cases, the thing which was the *causa mortis* was to be valued, and forfeited as a *chodand* to the king. Even if the inquisition did not find it to be felony, but sudden or accidental death, yet the finder, with all who were in his company, were to be attached till the coming of the justices.<sup>1</sup>

It was the business of the coroners to make like inquisition concerning treasure trove. If any one was charged with being the finder, or if a presumption was raised by expensive living, or otherwise, such person was to be attached by four or six pledges, and more, if they could be had. Again, in case of *raptus virginum*, if it was followed up with those circumstances of instant prosecution that are mentioned before from Glanville,<sup>2</sup> the coroners, to whom the complaint was made, were to attach the offender by four or six pledges, or, if there were no very strong marks of presumptive guilt, only by two.<sup>3</sup>

The coroners had a like office in appeals *de pace et plagis*. They were in the first place to inspect the wound, and if it was mortal, and the appellee could be found, he was to be taken and detained till the party recovered; and if he died, to be thrown into prison: but in the former case, the appellee might be attached by four, or six, or more pledges, according to the degree of the wound; and if it was a mayhem, certainly by more, that the security might be good; if he was a stranger, or could find no security, the gaol, says Bracton, was to be his pledge. The size of the wound, its length and depth, were to be measured, and that, together with the part of the body, and the arms it was made with, the coroner was to see described on a roll, with the attestation of the sheriff, if the inquisition was taken in his presence, or in the county.<sup>4</sup> Thus the coroners were the first spring in criminal prosecutions that were brought by appeal.

To return to the prosecution for homicide. If persons were committed to prison for the death of a man, they could be delivered only in one of these three ways: they might be discharged on pledges by the king's command; they might be delivered by judgment of acquittal; or, if they were clerks, they might be claimed by the ecclesiastical power. The way in which the king might deliver them was by the proceeding on the writ *de odio et atia*, which was mentioned in the observations upon *Magna Charta*.<sup>5</sup> This was a writ commanding the sheriff *per probos et legales, &c., inquiras, utrum A., &c., reclusus, vel appellatus sit, &c., odio et atia, vel eo quod inde culpabilis sit, &c.*

<sup>1</sup> Bract. 121 b. 122.<sup>4</sup> *Ibid.* 122 b.<sup>2</sup> *Vide ante*, vol. i. 200.<sup>5</sup> *Vide ante*, vol. i. 252.<sup>3</sup> Bract. 122.

Upon the return of guilty, he was not to be discharged on bail; but if it was returned that he was imprisoned *odio et atia*, he was bailed till the coming of the justices. This was effected by another writ to the sheriff: *Præcipimus, &c., si A., &c., invenerit tibi 12 probos et legales homines de com qui manucapiant habendi cum ad primam assisam, &c., tunc eum* TRADAS IN BALLUM *illis 12 probis, &c.* If the bailiff of a liberty would not admit a person to bail according to the sheriff's direction, there issued a writ to the sheriff commanding him, *non obstante libertate*, to enter and make deliverance himself.<sup>1</sup>

If a clerk imprisoned was demanded by the ordinary, he was to be instantly delivered, without any inquisition being taken; he was not, however, to be let loose upon the country, but to be kept in safe custody, either in the prison of the bishop, or, if the ordinary pleased, in that of the king, till he had purged himself from the offence with which he was charged, or had failed in making his purgation, and had been accordingly degraded. Sometimes the ordinary would not put a clerk to purge himself, unless a fresh charge was brought in the ecclesiastical court; in such case, a writ might be had to require him to proceed therein.

These were two of the ways in which a person imprisoned for homicide might be delivered; the third was by judgment of acquittal, which needs no explanation. In all other cases, the law was, that persons might be discharged on bail; and even in these cases the sheriff had such a discretion allowed him, that the liberty of persons charged with crimes depended wholly upon him. He was to judge from the nature of the fact, the person's circumstances, character, and the like; and accordingly, as he thought fit, was to commit to prison, or admit to bail. This became peculiarly hard from a piece of law then prevailing, namely, that breach of prison, however small the offence for which the party was committed, and though he was innocent, should be punished capitally; and this is one instance in which the law gave an entire indemnity to any of the accomplices who would discover the design.<sup>2</sup>

In the above cases, we have supposed the offenders were all forthcoming; but when they absented themselves immediately after the fact, the process was to raise *hutesium*, or hue and cry, and a *secta* or suit was made after them from town to town till they were taken, otherwise the township, where the fact happened, would be *in misericordia*. This hue and cry and suit was made in a different way, according to the custom of different places.<sup>3</sup> The suit was to be carried further than the search from town to town; for the offender was to be proclaimed in the county; a method which had been adopted in mercy to the absent fugitive, who, it should seem, by the old law was considered as an outlaw upon his flight merely, without being proclaimed with this formality in the county

<sup>1</sup> Bract. 122 b. 123 a. b.<sup>2</sup> *Ibid.* 124.<sup>3</sup> *Ibid.*

court.<sup>1</sup> The law now was, that sentence should not be pronounced against the party till suit was made in this manner in the county court, and he had had this warning to appear and purge himself. The time given for this was the space of five months; that is, he was to appear at the fifth county court, to answer for the offence with which he was charged; and if he did not, then he was adjudged an outlaw, and suffered all the consequences of such a sentence. If he appeared before that period, he saved the forfeiture of his land, but still forfeited his goods, on account of his flight, notwithstanding he might be innocent of the crime.

But the criminal could not be prosecuted to outlawry in this way, unless a person stood forth to make the suit, who could speak *de visu et audita* that the party had fled; and who would call upon him to return in the king's peace, or require that he might, at the proper time, be outlawed; and then he was to state the crime, as if the party was present, and the appeal was going to be heard; and he was to add, that should he appear, he would repeat the charge he had made. Thus not only *suit*, but the *appeal* was actually to be made, before the fugitive could be outlawed.<sup>2</sup>

It should here be recollected, that a *suit* and *appeal*, when for homicide, could not be prosecuted by every one, but only by one who was of the blood of the deceased; and that the nearest was preferred to the more remote. Yet some strangers were admitted to make *suit*; as one who was bound by homage to the deceased; or if he was of the *manupastus*, or family of the deceased person, or could say that he had received at the time of the killing any wound, or restraint, or the like. A minor might make suit, and appeal; but a woman, as we have before seen from Glanville and *Magna Charta*,<sup>3</sup> could not have an appeal except *de morte viri inter brachia sua interfecti*, as Bracton expresses it. It should be observed, that suit could not be made by attorney, if the party was able himself to prosecute.<sup>4</sup> If a sheriff proceeded to demand any one, without a person appearing to make suit, or without the command of the justices (who, we shall presently see, could make suit for the king in case of any intermission by the appellor), he was *in misericordia*.

Respecting the persons who might be outlawed, every male who was twelve years old might be outlawed, because a person of that age ought to be in some *decenna*, or, which answered the same purpose, in some *manupastus*; but those of inferior age, as they were not *sub lege*, could not properly be ever said to be outlawed, or put out of the law: the same of a woman, who, as she also was never *in laughe*—that is, in frankpledge, or in a *decenna*, could not be outlawed; but if she fled upon commission of any felony, she might be *wayviata*, as they called it—that is, be esteemed as one deserted and forlorn, which condition corresponded with that of outlawry.

<sup>1</sup> Bract. 125.<sup>2</sup> *Ibid.* 124.<sup>3</sup> *Vide ante*, vol. i. 251.<sup>4</sup> Bract. 124.

The time necessary to complete the outlawry was this: the offender was to be demanded at four counties, from county to county, till he was outlawed; but at the first county there was only to be what they termed *simplex vocatio*; and that was not computed towards the time as one of the four counties; so that in truth five were to pass before the outlawry was had; the outlawry therefore was to be at the fourth of those after the *simplex vocatio*. At the fifth, or, as they called it, the fourth county, no *essoia* or excuse could be received, nor was it sufficient that any one would engage to produce him at the next county; for this would be protracting the time of outlawry *ad infinitum*. But at any of the preceding counties, an engagement to produce the fugitive would be admitted till the fifth county; and the fugitive had till the fifth county to render himself to prison, or defend himself and purge his innocence; but after that time the outlawry stood in the way, and he could not return till that was removed by the mercy of the king.

If there was any delay in making the suit, as if hue and cry had not been raised, if the party had not been pursued from town to town, nor to the sheriff, nor to the coroner, nor at the first county; yet if a person chose to commence the suit afterwards, he might, as there was no one who had any right to object such deficiency in the proceeding. Again, if the suit had been begun in time, but a county court was suffered to pass without continuing it, the suit might, nevertheless, be resumed, so as the lapsed county was not reckoned towards the time of computing the outlawry; and so of any greater omission, which, if rectified, was always done with a view rather to favour the appellee than to oppress him. If upon any of the like failures of suit it was not again resumed, the county had no power to proceed to outlawry, but they were to wait for the coming of the justices, whose office it was, among other things, to

At the king's  
suit. give direction to the sheriff to proceed to outlawry, *c.c. parte regis*, in default of the appellor. Thus could the justices command the sheriff to proceed to outlawry, where there was any slackness in the party who had commenced the suit. They might likewise, in cases where no suit had been commenced by an appellor, command the sheriff to proceed to outlaw a person charged before them of any crime; but this could not be done till an inquisition had been taken, to try whether he was guilty or not. If the inquisition found him guilty, then the sheriff was commanded to proceed; otherwise, no direction was given about it. The sense of this was, that a reasonable presumption of the party's guilt should be raised before he was made liable to the penalty of an outlawry. The presumption founded upon a suit commenced, though intermitted, was thought sufficient to warrant the justices to direct a continuance of it; and if no suit had been commenced, a sufficient presumption was raised in this manner by the verdict of an inquisition.<sup>1</sup> This was the course in which criminals might

<sup>1</sup> Bract. 126.

be prosecuted at the king's suit, in default of the suit of the party.

If the due order and formality was observed in proceeding to outlawry, it could be removed no otherwise than by the king's pardon, even though there should afterwards appear to have been no crime committed, as if the person supposed to be killed should be produced alive. But should any of the necessary requisites towards the outlawry be wanting, it became void. Many were the instances in which this might happen. An outlawry was void if it had been without suit, or without a continuance of the suit, if it was proceeded in after the iter of the justices, without authority from them; or if it was commenced at the suit of the king, without a previous inquisition; if it was pronounced anywhere than within the county; supposing it for London, if it was pronounced out of the hustings; if the offender died before the outlawry; if the person supposed to be killed appeared alive before the outlawry pronounced; if the prosecutor died before the outlawry pronounced; if the accused had answered for the same offence in some other county; if he had surrendered himself to prison before the outlawry; if he had submitted to banishment by consent of the king; if the outlawry was pronounced before the legal time was elapsed; if he was under twelve years of age; in all such cases the outlawry would be declared void, upon the accused coming in to stand a trial for the offence.<sup>1</sup>

Process of outlawry lay in every case which was charged to be against the king's peace; but not in matters which concerned the sheriff's peace only.<sup>2</sup> Outlawry lay not only against those guilty of the *fact*, or, as they are more commonly called, principals, but also against those guilty of *force*, or, as they were afterwards called, accessories; and if neither of them appeared, the proceeding would be against both at the same time; only, at the last county, judgment was first to be pronounced against the principal, and then against the accessory, on the same day. Some thought it ought not to be even on the same day; and others said that the accessory was not even to be demanded till the principal was first convicted. But Bracton thought that, should they both fly, they ought to be proceeded against together, as above mentioned; only, should the accessory appear alone, then indeed he was not to be proceeded against till the principal was convicted, because, by his appearance, a presumption was raised of his innocence.

When a person was outlawed, every one who knowingly fed, received, or harboured him was subject to the same penalty as the outlaw himself; for which reason an outlaw had in earlier times been called a *frendlesman*; one who could not, by law, have a friend. An outlaw was said *caput gerere lupinum*, by which it was not meant that any one might knock him on the head, as has been falsely imagined, but only in case he would not surrender himself

<sup>1</sup> Bract. 127 a. b.

<sup>2</sup> *Ibid.* 127 b.



peaceably when taken ; for if he made no attempt to fly, his death would be punished as that of any other man, though it seems that, in the counties of Hereford and Gloucester, in the neighbourhood of the marches of Wales, outlaws were in all cases considered literally as *capita lupina*.<sup>1</sup> If an outlaw returned without the king's pardon, he might be executed without further legal inquiry ; for, says Bracton, *Iustum est iudicium, quod sine lege et iudicio pereat, qui secundum legem vivere recusat*.<sup>2</sup> An outlaw forfeited everything he had, whether it was in right or in possession ; all obligations and contracts were dissolved, and all rights of action ; and, like a judgment of felony, it operated with a retrospect to make void all gifts and sales made after the felony committed. The manner in which the forfeiture was distributed was this : all chattels went to the king ; the lands were taken into the king's hands for a year and a day, and after that (unless holden *in capite*) they reverted to the lord of whom they were holden. The king's year and day had grown into a regular casualty, in lieu of the singular species of punishment he might inflict by destroying houses, gardens, and meadows ; and even the year and day used sometimes to be released upon the lord's paying a fine.<sup>3</sup>

When a person had been outlawed according to all the forms of law, he could only be restored, as was said before, by the king's pardon, and that restored him only to the king's peace, so as to enable him to appear without hazard to his person ; all the forfeitures remained, and every other consequence of the outlawry. For though the king might remit his own claims, he could not release or disturb the interest of others.<sup>4</sup> This pardon, however, as it only removed the outlawry, still left the party to be proceeded against by the appellor for the offence with which he was charged.<sup>5</sup>

In such instances, where the king would have pardoned a conviction of the fact, he would readily pardon the outlawry, as in case of homicide *per infortunium*, or *se defendendo* ; and in general where there was really no offence committed. Process of outlawry would not lie against a clerk, any more than judgment of death.<sup>6</sup>

We have hitherto spoken of such homicide as had been committed in the presence of persons, who could testify concerning it. There was another degree of homicide, which was when any one was killed *nullo sciente vel vidente, præter solum interfectorem et suos coadjutores et fautores* ; et ita quod statim assequatur clamor popularis ; this was called *murdrum*, and had been described in the same manner by Glanville.<sup>7</sup> In this case it was presumed, according to the law of William the Conqueror, that the party killed was a Frenchman, unless *Englishery*—that is, his being an Englishman was proved by the relations, and presented before the justices.<sup>8</sup>

There were many cases where a county was excused from pay-

<sup>1</sup> Bract. 128 b.

<sup>2</sup> *Ibid.* 129.

<sup>3</sup> *Ibid.* 129.

<sup>4</sup> *Ibid.* 131, 132 a.b.

<sup>5</sup> *Ibid.* 133 b.

<sup>6</sup> *Ibid.* 134 b.

<sup>7</sup> *Vide ante*, vol. i. 198.

<sup>8</sup> Bract. 134 b.

ing a fine for this *murdrum*. One was where the killer, whether taken or not, was known; for then the felony might be prosecuted, either by suit or inquisition, to outlawry: much more if the killer was taken, for then he might be punished; so, if the party survived some days, for he might discover the offender, and declare whether he was an Englishman or a Frenchman; if any had fled to a church for the death, and had confessed it; so where the person was killed *per infortunium*, as by suffocation, drowning, or the like accident, though in some places the custom was otherwise. In all cases but the preceding, if the killer was not known (whether the person slain was English or not) a *murdrum* was to be paid, unless *Englishery* was duly presented. This present-<sup>Presentment</sup>ment was to be before the coroners, at the very time of Englishery. they made inquisition of the death. The proof was different in different counties; in some, the fact was presented by two males on the part of the father, and two females on the part of the mother, of the nearest of kin to the deceased; in some counties by one of each; in others differently. The names of these persons were to be enrolled in the rolls of the coroners, and to be presented before the justices itinerant. If there was any doubt, either of what the relations alleged, or whether they were related to the party, the *Englishery* was to be declared *per patriam*.<sup>1</sup>

If an offender fled to a privileged place, he might either surrender himself to justice, or abjure the realm of<sup>Abjuration.</sup> England. If he chose the latter, a certain number of days were to be allowed him to reach any port he should choose, to which he was to make the best of his way, never leaving the king's highway, nor delaying two nights at a place; but he was to keep on, so as to arrive at the port within the stated time, and transport himself as soon as possible. Before he set out he was to bind himself by an oath, taken before the coroners or the justices, that he would leave the kingdom of England, and never return to it but by permission of the king. This oath ought to be taken within forty days from the offender's first going to the privileged place, that being the space of time allowed by the law to sanctuary-persons, and particularly prescribed by the Constitutions of Clarendon,<sup>2</sup> as the period within which persons acquitted by the ordeal should abjure. However, if the person flying to sanctuary would not leave it at the appointed time, he could not be removed from thence by lay hands; but it rested with the ordinary of the place to remove him, if he thought fit. Should the bishop scruple to infringe the privilege of sanctuary (a scruple which could very rarely be removed in the mind of a churchman), there remained nothing but to starve him out.<sup>3</sup> Thus stood the law of sanctuary and abjuration.

If a person was in custody for a felony, he was not to be stripped immediately of his goods and chattels, but as soon as he was

<sup>1</sup> Bract. 134 b. 135 a. b.<sup>2</sup> Vide ante, vol. i. 193.<sup>3</sup> Bract. 135 b. 136.

taken, they were to be appraised by the guardians of the pleas of the crown, the bailiffs, and other lawful men, and to be safely kept by the bailiffs till the prisoner was either convicted or acquitted. In the meantime, he was to have the use of them to provide himself with necessaries; and if they were taken from him, he might have a writ, commanding the sheriff to see it ordered in the above manner. It was a rule that a prisoner should not be brought before the justices *legatis manibus*, with his hands tied; though sometimes, to prevent escapes, they might bind his feet.<sup>1</sup>

Having thus brought the prisoner into court, the next step would be to state the words of the appeal, with the defence of the appellee, and the joining issue on the fact, and going to trial; but before we come to speak so particularly of this proceeding, it will be proper to premise somewhat concerning the alterations which had taken place during this reign in the modes of trial in criminal inquiries. The trial by ordeal had continued till the judgments

Ordeal goes of councils<sup>2</sup> and the interference of the clergy at length out of use. prevailed against it. In the third year of this reign direction was given to the justices itinerant for the northern counties (and probably to the others likewise) not to try persons charged with robbery, murder, or other such crimes, by fire and water; but, for the present, till further provision could be made, to keep them in prison under safe custody, so, however, as not to endanger them in life or limb; and for those who were charged with inferior offences, to cause them to abjure the realm.<sup>3</sup> What further provision was made, as thereby promised, does not appear (a); but

(a) There was no statutory enactment, but (as Dr Lingard states) the judges, of their own authority, adopted a practice which had been creeping into the criminal courts ever since the proof of innocence by compurgation had been abolished under Henry III. When a prisoner found himself incapable of battle, or was afraid of the trial by battle, he would solicit, and sometimes purchase of the crown, permission to put himself upon his country—that is, to have the question of fact determined by inquest of the jurors of the court, as was generally done in civil suits (see instances in *Rot. Curie Reg.* of Richard I. and 1 John, vol. i. 204; ii. 30, 97, 121, 173, 230, 245). On these occasions the accused often pleaded that the charge was founded in malice and hatred, and asked that the jury might inquire, “*utrum alia sit vel non.*” It had been hitherto a favour, which depended on the discretion of the judges; but now it was offered to all, and was gladly accepted by most. The accused had, indeed, the right of rejecting it; but if he did, and refused to plead before a jury, he might be remanded to prison, and be made to suffer the *peine forte et dure*.—(*Lingard's Hist. Eng.*, ii. c. 6). For this latter part of the statement, the learned writer cites no authorities, except the entries in the rolls already quoted—entries of prisoners putting themselves on the country, which do not support it. It is certain, however, that in Alfred's time there was trial by jury in criminal cases, and equally certain that jurors, in those days, were witnesses; and that if there were no witnesses, as there could hardly be in many criminal cases, as murder, there could be no trial by jury, and therefore the ordeal was resorted to, in default of witnesses. On the other hand, if there were witnesses (in which case the accused might prefer the ordeal), it does not appear whether trial by jury was enforced, or whether the accused had an option. The question, however, as to the enforcing of trial by jury in all criminal cases, appears to depend upon a consideration overlooked by the learned historian just quoted—viz., Whether or not, at this period, trial by jury had ceased to be mere

<sup>1</sup> Bract. 136 b. 137.

<sup>2</sup> Dugd. Ori. Jur. 87.

<sup>3</sup> Dec. para. 2, caus. 2, quest. 5, c. 20.

we find this order of council had such an influence towards abolishing this superstition, that it went quite out of use by the time of Bracton, who makes no mention of it in his book (*a*). As to the trial by duel, it should seem that some direction, like that just mentioned, had been made, which gave to a party appealed au

trial by witnesses, and had become a trial by the jurors upon the evidence; for, if not, it is difficult to see how the trial by jurors could be enforced in all cases—*i.e.*, in cases where there were no witnesses. For so long as jurors were witnesses, there could be no trial by jury where there were no witnesses. It rather appears that, at this period, jurors had not ceased to be witnesses; and therefore there is reason to doubt whether the learned Lingard is right in supposing that, at this time, trial by jury was directly enforced in all cases; nor do the entries on the rolls he refers to appear to support such a conclusion, as they only show that there was trial by jury allowed. It was quite another thing to enforce it; and of this there is no evidence. The ancient usage, as stated by the author a little further on, was to give the option to a prisoner to be tried “by God”—*i.e.*, the ordeal—or “your country,” which meant a jury; and this supports the view that trial by jury was allowed in criminal cases, as it was in the reign of Henry II. in civil cases, and also seems to show that trial by evidence was gaining ground. It would appear, indeed, that under the ordinance now in question, some inquiry must have been made by means of evidence; and there is no doubt it was an indirect way of coercing prisoners to put themselves upon the country, by keeping them in prison until they did so. This view is supported by a passage in the *Mirror . . . temp. Edward I.*—which complains that the people were not allowed the trial by the miracle of God, as the ordeal was called.

(*a*) There can be no doubt that trial by jury very gradually superseded every other mode of trial. The trial by jury which was mentioned by Glanville, in the reign of Henry II., as *jurata patris sive cuncto* (Glan. lib. ix., c. xi.; vii., c. xvi.; v., c. iv.), and in his time allowed as real actions at the election of the defendant, was afterwards so much approved of, that suitors were led to adopt the same course of proceeding by mutual consent, or by advice of the court, as Glanville says: “*Tunc a consensu ipsorum partium tunc etiam de consilio curie*” (lib. xiii., c. ii.). And instances of it are to be found on the rolls (see *Placit. Abb.*, 140; *Bract.*, 147); and in the time of Bracton it had become the most ordinary method of deciding questions of fact.

It is, however, abundantly manifest that at this time jurors still continued to be only witnesses, and to find their verdicts, as Bracton often explains, only upon what they have themselves known, and heard, or seen. Thus, in the reign of Richard I., the jury found a special verdict in these terms:—“*Assisa dicunt quod nunquam viderunt aliquam personam presentari ad ecclesiam sed semper tenuerunt personam, personam in personam ut de patre in filium, usque ad ultimam personam que ultimo obiit*” (*Plac. Abb.* iii.; *Norfolk*). So in the same reign, in an assize of novel disseisin, there is this entry: “*Assisa venit recognitura si Adam de Grenville et Willielmus de la Folie dessaisaverunt injuste, et sine iudicio, Willielmum de Weston de libero tenemento, juratores dicunt, quod non viderunt unquam aliquem saisitum de tenemento illo nisi Will. de la Folie*.” So, in the reign of John, there is this entry:—“*Juratores dicunt quod ecclesia sancta Helenæ nunquam fuit capella pertinens ad ecclesiam sancti Michaelis quæ est de donatio domini regis, sed semper temporibus suis judicaverunt illam esse matricem ecclesiam*” (*Plac. Abb.*, 94; *Lanc. rot.* iii.). “*Et quod nesciant si Willielmus de la Folie dissaisisset, cum inde vel non, consideratum est quod alii juratores eligantur qui melius sciunt rei veritatem. Dies datus est eis ad diem Mercurii*” (*Plac. Ab. Wilteser*). From this it appears, that if it happened that the jury did not know enough of the matter to determine it, the course was to have another. So it is laid down in Bracton, upon a question whether the plaintiff, claiming to be tenant by the courtesy, had issue by his wife: “*Si dicant juratores quod bene viderunt eum seysitum et postea ejectum per tenentem sed de aliquo puerro nihil sciunt, quia mater obiit inpariendo, extra comitatum in remotis, quia eorum vegedictum inausfiens est et quia ipse ignorare possunt ea quæ sunt in remotis, recurrendum erit ad comitatum et ad vicinetum ubi mater obiit; et ibi facta inquisitione de veritate terminetur negotium*” (*Bracton*, fol. 216 a). Thus it is, that in an assize the jurors were said to recognise—that is, to declare upon their knowledge or recollection. Thus, in the reign of John, we find a jury declaring: “*Quod ipse recognoverunt quod interfuerunt ubi Ricardus de W. coram ipsis et aliis, etc., propria voluntate vendidit terram suam,*” &c.

election to defend himself *per corpus* or *per patriam*; a regulation which, no doubt, was framed in analogy with the institution of the assize in lieu of the deul in a writ of right; and as in that, so here, if the appellee put himself upon the country, he could not afterwards defend himself by duel, nor *vice versâ*.<sup>1</sup>

This option of trial was not so wholly left to the party appealed, but that the justices assumed a power of control in certain cases of a very particular nature; and directed the one or the other, as it seemed to them best suited to the matter of inquiry. Thus where a person was poisoned, the appellee had no election, but was compelled to defend himself *per corpus*; because, says Bracton, the *patria* could know nothing of a concealed fact, like this, but by conjecture or by hearsay, which would be no proof, either for the appellor or the appellee. Again, some cases were held so clear, as to stand in need of neither; as, where a person was found near the deceased with a drawn knife; where a person slept in the same house with the deceased, and raised no hue and cry. In these and the like cases of violent presumption, the appellee was not admitted to defend himself either *per corpus* or *per patriam*, but such a manifest circumstance was considered as a conviction of the fact.<sup>2</sup>

In all appeals of felony it was required, that the year, day, hour, and place, should be stated precisely; and it was to be charged *de visu et auditu*, upon the testimony of the party's own senses. The form of an appeal of homicide was as follows: *A. appellat B. de morte C. fratris sui, quod sicut ipse A. et C. frater suus essent in pace Dei et domini regis apud such a place, faciendo such a thing, or transeundo from such a place to such a place, on such a day, year, and hour, venit idem B. with such a one, et nequiter, et in feloniam, et in assultu premeditato, et contra pacem domini regis ei datam, fecit idem B. prædicto fratri suo C. unum plagam mortalem in capite quodam gladio, ita quod obiit infra triduum de plaga illa; and then concluded thus: Et quod fecit hoc nequiter, et in feloniam, et contra pacem domini regis, offert se disrationare versus eum ubicunque per corpus suum; sicut ille qui præsens fuit, et hoc vidit, et sicut curia domini regis consideravit, et si de eo malè contigerit, per corpus of such a one, fratris sui, or parentis C. qui similiter hoc offert disrationare per corpus suum, sicut curia consideraverit.*<sup>3</sup> This was the form of an appeal against the principal. An appeal against an accessory, or one guilty of force, as they called it, was thus: *A. appellat B. de fortiâ, quod cum ipse et C. frater suus essent, &c., venit idem D. cum prædicto B. et cum aliis, naming them, et tenuit ipsum C. fratrem suum, quamdiu ipse B. interfecit eum; et quod hoc fecit nequiter, &c.* After this the appellee made his defence, in this way: *Et B. venit, et defendit omnem feloniam, et pacem domini regis infractam, et quicquid est contra pacem domini regis, et mortem, and everything*

<sup>1</sup> Bract. 137.<sup>2</sup> *Ibid.* 137 a.b.<sup>3</sup> *Ibid.* 138.

charged in the appeal; and concluded with putting himself upon the country, or defending himself *per corpus*; *et quod idem inde culpabilis non sit, ponit se super patriam de bono et malo*, if he chose that trial; or *paratus est se defendere versus eum per corpus suum, sicut curia domini regis consideraverit*. The appellee was compelled to name one or other of these trials; for if he had said simply, *quod velit se defendere, sicut curia domini regis consideraverit*, it would have been no defence at all;<sup>1</sup> and accordingly, we may suppose, the appeal would have been taken *pro confesso*; for the court were not to instruct him how he was to defend himself. But if he had said, *paratus sum defendere vel per corpus meum, vel per patriam, sicut curia consideraverit*, it should seem, says Bracton, that he thereby gave up his election; and then, we suppose, the court would refer it to the more rational trial, that by jury.<sup>2</sup>

If he made choice of the trial *per patriam*, he was not to prefer the *patria* of any hundred he liked; but that was to be determined by the judge, who might assign which twelve he pleased, of those returned for each hundred. This practice was in order to guard against partiality and collusion; for, says Bracton, a man might have lived very reputably in one *patria*, and not so in another. If he had chosen the defence *per corpus*, the justices, before they suffered the duel to commence, were to examine into the circumstances of the fact, lest it might be some trifling trespass, in which the duel would not lie: a laudable caution to prevent the unnecessary hazard of life in that barbarous trial.<sup>3</sup>

But many exceptions might be made to the appeal, which would supersede the necessity of recurring to either of these trials. These were either such as were general, and <sup>Exceptions</sup> thereto, were equally decisive in all appeals; or such as were specially appropriated to particular prosecutions. Of the former kind were the following: that suit had not been properly made; that the coroner's roll and the appeal made in court did not agree; that the coroner's and sheriff's rolls varied from each other; that the appellee had been already appealed and acquitted of the fact; that an iter had intervened since the fact, without any prosecution commenced;<sup>4</sup> that the appeal was brought *per odium et atiam*; that it would not lie between the appellor and appellee, being lord and tenant, or lord and villein; that there was no mention in the appeal *de visu et auditu*; that there was a variation in the name; that the appellor had once made a *retraxit* of his suit; that the appellor was a manifest traitor convict, or a thief, and provor; that the fact was not laid *de pace domini regis*, but *de pace justitiarum*, or *de pace vicecomitis*; that it was not laid to be a felony;<sup>5</sup> that

<sup>1</sup> Bract. 138 b.

<sup>2</sup> Perhaps this might be the origin of the modern form in which a prisoner puts himself on trial—*by God and my country*—though now the *or* is changed to *and*; the former signifying the same as *per corpus*, which was always considered as an appeal to heaven.

<sup>3</sup> Bract. 138 b.

<sup>4</sup> *Ibid.* 139 b. 140 a. b.

<sup>5</sup> *Ibid.* 141.

the appellor was a clerk. The appeal might also be deferred for a time, by alleging the minority of either the appellor or appellee.<sup>1</sup>

If none of these exceptions could be made and supported, the duel might be waged. We have seen in what manner a right to land was tried by duel.<sup>2</sup> We have now an opportunity of relating the method of ordering this proceeding in an appeal. When the duel was waged, the appellee first gave security to defend, and then the appellor gave security to maintain the appeal; after which the appellee took an oath, denying the matter of the appeal word for word: "Hear this, O man, whom I hold by the hand, who call yourself John by the name of baptism, that I did not kill your brother, nor gave him a wound with a sort of weapon by which he might be removed further from life, or brought nearer to death; nor did you see this, so help me God, and these holy Gospels." This was the form of swearing, with the additional circumstances of time, place, and the like. It seems very remarkable, that anything should be rested upon the sort of instrument with which a man was killed; but so it was. Bracton says, it might be laid in the appeal as done with any kind *armorum molitorum*; but not with a stick, or stone, or other weapon that could not be said to be *arma moluta*. It may be said, that Bracton states this only as an opinion held by some, *secundum quosdam*; yet he seems to give an absolute opinion, that a wound with a stick or stone would not be properly laid.<sup>3</sup>

After this, the appellor swore in maintenance of his appeal thus: "Hear this, O man, whom I hold by the hand, who are called John by the name of baptism, that you are perjured, and therefore perjured, because you wickedly and feloniously did kill C. my brother; and wickedly and feloniously, and with a premeditated assault did give him such a wound, with such a sort of weapon, that he died thereof in three days; and this I saw, so help me God, and these holy Gospels:" to which were to be added, as in the former oath, the time, place, name, and the other necessary circumstances, so as to support and cover everything charged in the appeal. After the oaths were thus taken, the appellee was to be committed to two knights or other lawful men, according to his rank, who were to lead him to the field assigned for the duel; and the appellor in like manner. There they were both to be guarded so that no one might converse with them, till they engaged in the duel. Before they engaged, each was to swear in this manner:<sup>4</sup> "Hear this, ye justices, that I have not eat nor drank, *nec aliquis pro me, nec per me propter quod lex Dei deprimi debeat, et lex diaboli ex altari, sic me Deus adjuvet.*" After this a proclamation was made, forbidding all persons, whatever they heard or saw, to move or speak a word, upon pain of imprisonment for a year and a day; and then the appellor and appellee engaged. If the appellor was vanquished, or if the appellee defended himself the whole day till

<sup>1</sup> Bract. 141 b.<sup>2</sup> *Vide ante*, vol. I. 123.<sup>3</sup> Bract. 138.<sup>4</sup> *Ibid.*



the stars began to appear, he was acquitted of the appeal; because the appellor had engaged to convict him that *day*, and had failed. He was also acquitted as against all others who had appealed him of the same fact; as were those likewise who were appealed of *force or command*. But if the appellee was vanquished, he suffered capitally, and forfeited everything from him and his heirs, as was before stated in case of outlawry. Should the appellor, when he came into the field, make a *retraxit* of the appeal, he was to be sent to gaol, and he and his pledges of prosecuting the duel were *in misericordia*. But it was otherwise, if he was vanquished; for though he was to be sent to gaol, he was generally pardoned the *misericordia*, in consideration that he had engaged in maintenance of the king's peace.<sup>1</sup>

After the principal was convicted, they might proceed to the duel against the accessory. This might be the next day. Or, if the accessories had not been yet appealed, they might then state an appeal against them, and proceed in like manner as before mentioned in case of principals; and the accessory, if convicted, would suffer, as the principal, according to the maxim, *satis occidit qui precipit*. If anything happened which prevented the appeal against the accessories, the king might take it up *pro pace sua*; and then the trial would of necessity be *per patriam*; for the duel could not be waged against the king. There were other instances where the duel could not be waged; as, when the appellor was a woman; when the appellor had been maimed, or was above sixty years old; though in this last case he had his election.<sup>2</sup> We have seen, in Glanville's time, that there was a different judgment, when the offender failed to purge himself *per legem*, and when he was vanquished in the duel.<sup>3</sup> A similar difference seems to have subsisted at this time; for when the king pursued an appeal *pro pace sua*, and convicted the party by the inquest, Bracton doubted what was to be the punishment. Some thought it was to be capital, as it would have been if the appeal had gone on at the suit of the party; others thought, that it was to be only a pecuniary penalty; and yet, where a woman convicted a man of a rape *per patriam*, he suffered as upon an appeal in other cases.<sup>4</sup>

We have hitherto been treating of a prosecution when a person chose to stand forth as accuser, and when the king carried on the suit, on the omission or failure of such person in continuing it. It remains now to say something upon the other mode of prosecution, which was when a person was indicted *per famam patrie*. This was probably no other than the *fama publica* mentioned by Glanville;<sup>5</sup> which raised a presumption amounting to a conviction, till the party had purged himself from the suspicion thereby thrown upon him; for this, like other presumptions, was open to a proof or purgation to the contrary. The *fame* which

<sup>1</sup> Bract. 142.<sup>4</sup> Bract. 143.<sup>2</sup> *Ibid.* 142 b.<sup>3</sup> *Vide ante*, vol. I. 200.<sup>5</sup> *Vide ante*, vol. I. 197.



was sufficient to raise this presumption, ought to be such as was entertained by good and grave men, who deserved credit, and not the flying reports of common conversation. Thus, as a person indicted *per famem patriæ* was charged by the *patria*, or twelve jurors, elected in the manner before mentioned, who had founded the accusation upon their own knowledge or persuasion, collected from observation or report; it became the judge, if he had any doubt, or suspected the jury, to make strict examination into the matter, and ask the twelve how they learnt what they in their verdict declared concerning the person indicted; and upon their answers he might judge whether the charge was founded in truth or malice.<sup>1</sup> Perhaps, says Bracton, some of the jurors might say, that they collected their information from one of their brother-jurors; who, upon being interrogated particularly, might say he had it from such a one, and so on, till it was traced to some disreputable person, who deserved no credit. It often happened that these examinations brought to light the iniquity of a charge. It sometimes turned out that an imputation of a crime was contrived to be thrown on a freeholder by his lord, in order to get an escheat; sometimes by a neighbour from other malicious motives.

When this examination had been made in order to proceed to taking the verdict, and giving judgment thereon with more security, then the judge was to inform the party indicted, that, if he entertained suspicion of any of the jurors, he might have them removed; for, if no objection was made to any of them, when the twelve jurors<sup>2</sup> appeared, they were all sworn, either singly, or all together as follows: "Hear this, ye justices, that we will speak the truth of that which you shall require of us on the part of our lord the king, and in nothing will we omit to speak the truth; so help," &c. After which one of the justices gave them the matter in charge, in this way: "This man, who is here present, charged with such a crime, comes and defends the death and everything with which he is charged, and puts himself thereof upon your tongues, *de bone et malo*; and therefore we charge you, by the faith by which you are bound to God, and by the oath you have taken, that you make known to us the truth thereof; nor do you omit, through fear, love, or hatred, but that, having God before your eyes, you declare whether he is guilty of that with which he is charged, or not guilty; and do not bring any mischief on him, if he is innocent of the crime." According to the verdict given by the jurors, the party was either delivered or condemned.

The form in taking an inquest *per patriam* was to be observed by the justices in all cases, where a party, as in the above-mentioned instances, had put himself upon an inquest. Whenever the justices

<sup>1</sup> Bract. 143.

<sup>2</sup> It seems from the manner in which Bracton expresses himself, as if, in cases of killing, the four townships which had appeared before the coroners were joined with the jurors of the *patria*, and must concur with them in their verdict. Bracton says, that any of the townships might be challenged, the same as the other jurors. Bract. 153 b, 154 a. *Vide ante*, vol. I. 193.

suspected the charge to be true, and that the jurors, through fear, or love, or malice, were inclined to conceal the truth, they might, if they pleased, separate them one from the other, and examine them apart, in order to sift out the real truth of the matter.<sup>1</sup>

Here then do we see the office of the twelve jurors chosen out of each hundred at the eyre; they were to digest and mature the accusations of crimes founded upon report, and the notorious evidence of the fact; and then, again, under the direction of the justices, they were to reconsider their verdict, and upon such review of the matter, they were to give their verdict finally. Again, whenever any circumstance rendered it unlawful or impossible that the duel should be waged in an appeal, the truth was inquired of by these jurors; and we may suppose, that in all other causes in the eyre, whether civil or criminal, where a matter arose that was to be tried by a jury, it was referred to one of these juries who attended there on the business of the county. It may be collected from a single mention of purgation by Bracton, that a person charged *per patriam* might purge himself, as formerly,<sup>2</sup> or put himself on the country, as before mentioned.

Now have we finished all that can be said concerning an appeal of death. There were several other cases of personal injury, where an appeal was the usual mode of prosecution. One of these was *de pace et plagis*, as they called it. The form of this appeal was, *A. appellat B. quòd such a day, sicut fuit in pace domini regis in such a place, venit idem B. cum vi sua, et contra pacem domini regis in feloniam, et assultu premeditato fecit ei insultum, et quandam plagam ei fecit in such a part, with such a sort of arms; et quòd hoc fecit nequiter, et in feloniam, offert probare versus eum per corpus suum, &c.*, as in the before-mentioned appeal. To this the appellee made his defence: *Et B. venit, et defendit pacem domini regis infractam, et feloniam, et plagam, et quicquid est contra pacem domini regis*, and so on, denying the whole appeal *per corpus suum secundum quod curia consideraverit*. In this there might be the same general exceptions made, as were stated in case of homicide; as, that suit was not made before the sheriff and coroners, and the like. The appellee might have his option, whether to defend himself *per corpus* or *per patriam*, except in some few cases, where the trial by duel was not allowed; as, if it was not a *plaga*, but only a bruise; and for that purpose the party was to be inspected and examined; for if it was not a *plaga*, it was only a trespass, and no felony.<sup>3</sup> In like manner, if it was not laid *armis molutis*, but if it was done by a stone or stick, in this appeal, as well as in that of homicide, as we before observed, they could not decide it by duel; for these weapons, says Bracton, made only a bruise, and not a *plaga*, or wound.<sup>4</sup>

Another appeal for a personal injury, more aggravated than the foregoing, was that *de plagis et mahemio*; which appeal was stated

<sup>1</sup> Bract. 143 b.<sup>2</sup> Vide ante, vol. i. 195.<sup>3</sup> Bract. 144.<sup>4</sup> Ibid. 144 b.

much in the words of the former : *A. appellat B. quòd cùm esset in pace domini regis in such a place, &c., venit idem B. cum vi suâ, et in felonîâ et assultu premeditato, &c.*, as in the former, *et fecit ei quandam plagam in capite, ita quòd mahemîatus est ; et quòd hoc fecit nequiter et in felonîâ, offert probare versus eum, sicut homo mahemîatus, prout curia domini regis consideraverit* : and the defence, *Et B. venit, et defendit, &c.* The first step to be taken was for the justices to inspect the wound, to see if it was a mayhem ; and if it was, the appellee was constrained to defend himself by the country ; for it would be a double injury to oblige the appellor to engage in the duel. A mayhem was defined to be, when a man was rendered, in any part of his body, unfit for fight ; as if a bone was extracted from the head ; if any bone whatsoever was broken ; or the foot, hand, or finger, or joint of the foot or hand, or any other member was cut off ; or if the sinews or any member were contracted, or the fingers crooked, by a wound ; if an eye was beat out ; in short, if any hurt was done to a man's body that rendered him less able to defend himself. Bracton thought, that breaking out the teeth was a mayhem, if they were the front teeth, because it disabled, in some measure, from fighting ; but not so of the others. Castration was a mayhem, though an injury out of sight, and causing no outward disfiguring. There were some mayhems which were not a bar to the appellor engaging in the duel ; as where an ear or a nose was cut off ; this, though a disfiguring, not being such as would disable him from sustaining the duel. There lay in this appeal the same objections concerning the wounding and weapons, as in the former.<sup>1</sup>

The next appeal, grounded upon a personal injury, is what they call *de pace et imprisonamento* ; which was, where a free man was taken and imprisoned against the king's peace. The words of the appeal were, *A. appellat B. quòd sicut fuit in pace domini regis, &c., venit idem B. cum vi suâ contrapacem, &c., et duxit eum to such a place, &c., et in prisonâ ibi eum tenuit, &c., donec deliberatus fuit per ballivum domini regis ; et quod hoc fecit nequiter, et in felonîâ, offert, &c.* The defence was, *Et B. venit, et defendit vim, et injuriam, et pacem domini regis infractam, et captionem, et imprisonamentum, &c.* To this appeal might be taken the like exceptions as to the former. The appellee might justify taking him as his villein *nativus*, and might produce his relations to prove him such. The principal issue might be tried, as in the other appeals, *per corpus* or *per patriam*.

In an appeal, says Bracton, *de pace et plagis*, and in this *de pace et imprisonamento*, they might proceed civilly, notwithstanding the fact was criminal, and make the complaint as for an injury, without charging it *feloniously* ; *quòd B. imprisonavit A. contra pacem domini regis* : and so, if in the county, *contra pacem vicecomitis* ; if in an inferior court, *contra pacem* of the lord. If it was laid as

<sup>1</sup> Bract. 145.

an injury in this manner, it would not be followed with any corporal pain, but only a pecuniary fine, by way of damages; but when it was prosecuted as a felony, these offences, as well as the others, produced a judgment of life and limb.<sup>1</sup> It should seem, that an appeal, laid in this way, would become what we should now call an action of trespass.

Before we take leave of *imprisonment*, it may be proper to mention a more speedy redress, in cases of imprisonment, than an appeal. This might be resorted to, not only where a private person imprisoned or put restraint upon another, without any show of authority, but also where officers of justice, under colour of process, caused persons to be put in confinement. It was from this latter case that the writ *de homine replegiando* took its name, and to this it was more peculiarly adapted; for, in the former instance, it was most probable a person would use that power, which the law allowed, of recovering his liberty by force, or whatever means fell in his way. The writ was directed to the sheriff, as follows:—*Præcipimus tibi, quòd justè et sine dilatione replegiari facias A. quem B. cepit et captum detinet; nisi captus sit per speciale præceptum nostrum, vel capitalis justitiarîi nostri, vel pro morte hominis, vel forestæ nostræ, vel pro aliquo alio recto, quare secundum legem Angliæ non sit replegiandus, ne ampliùs, &c., pro defectu justitiæ, &c., teste, &c.*<sup>2</sup> A man, therefore, who was taken and detained unlawfully, was to be discharged upon pledges being given, as in the case of goods taken for a distress.

To these remedies by way of redress, or punishment when an injury had been done to a man's person, it may be added, that the law held out a protection, by way of security and prevention, to those who apprehended any danger of that sort. Thus a man might pray the king's peace in court against any particular person; and if such person should, after that, do anything in breach of such peace, he incurred the penalty of the court's displeasure, and was accordingly *in misericordiâ*.<sup>3</sup>

There now remain only four more appeals to be explained; that *de pace et roberîâ*; that *de combustione domorum*; that *de raptu virginum*; and lastly, that *de furto*.

The appeal of robbery was in this way: *A. appellat B. quòd sicut fuit in pace domini regis, &c., venit idem B. cum vi suâ, et nequiter et in felonîâ, et contra pacem domini regis, et in roberîâ abstulit ei, &c.,* naming the thing taken, its quality, quantity, price, weight, number, colour, and the like. Sometimes there was contained in this appeal a charge of wounding, mayhem, or imprisonment. The conclusion was, as in the other appeals, *et quòd hoc fecit nequiter et in felonîâ, &c.* Then begun the defence. *Et B. venit, et defendit pacem et feloniam, &c.* A person might have this appeal for the goods of another which were then in his keeping, but he was to state such circumstance specially: *Abstulit ei decem aureos, de*

<sup>1</sup> Bract. 145 b.<sup>2</sup> Ibid. 154.<sup>3</sup> Ibid. 142 b.

*denariis domini sui, quos habuit in custodia sua, et unde ipse intravit in solutionem erga dominum suum, &c.* The punishment of robbery depended upon the nature of the crime; it was sometimes punished with loss of life, and sometimes with loss of limb.<sup>1</sup> The felonies of this time were punished variously, according to the circumstances of the case, by death or mutilation; and hence it was, that judgment of life and limb signified in after times the same as judgment of felony.

All burning of other persons' houses, if done *nequiter et in feloniam*, as on account of any malice, or animosity, or for sake of plunder, was punished capitally. The appeal was in these words: *A. appellat B. quod cum ipse esset in pace, &c., venit idem B. nequiter et in feloniam, &c., ubi ipse A. interfuit et vidit, et ignem apposuit domibus suis, et eas combussit, et de catallis, &c., in roberiam contra pacem, &c., asportavit, &c.*, to which the appellee made his defence, and the proceeding was the same as in other appeals.<sup>2</sup>

The appeal *de raptu virginum*, as it is called by Bracton, was not confined to those only who were literally such, but was a remedy in all cases where a woman had been *vi oppressa*. The punishment of this crime was *membrum pro membro*, according to Bracton; *corruptor puniatur in eo in quo deliquit; oculos igitur amittat, propter aspectum decoris, quo virginem concupivit; amittat et testiculos, qui calorem stupri induxerunt*. This was not always the punishment; but it was varied according to the character of the woman. It was sometimes greater, sometimes less; and depended on the woman being married, or a widow living in reputation a nun, a matron, a lawful concubine, or one living in prostitution; for even these were under the protection of the king's peace. In former times, the corruptors of virgins used to be hanged; but the punishment was now reduced to the above pain, loss of limb, and other corporal punishments, and such offenders were never punished with death.<sup>3</sup>

An appeal of rape was to be commenced and conducted like others. The words of appeal were these: *A. femina B. appellat C. quod sicut esset in, &c., venit idem C. cum vi sua, et nequiter et contra pacem domini regis concubuit cum ea, et abstulit ei pucillagium suum, et eam detinuit secum per tot noctes*, setting forth the circumstances of the fact; and concluding, *quod hoc, &c., offert probare, &c.*, as in other cases. Then followed the defence: *Et C. venit, et defendit feloniam, et pacem, et raptum, &c.*<sup>4</sup> It was an exception to this, as to other appeals, that there was not sufficient suit made; with others arising from the circumstances peculiar to this crime. The party might deny that she *amisit pucillagium*; which would be tried by inspection of four *legales feminae*. He might say, that she had before been his mistress; that it was with her consent; and he might put himself on the country to try it. He might except that there was no mention in the appeal *de pucillagio*.

<sup>1</sup> Bract. 146 a. b.<sup>2</sup> *Ibid.* 146 b.<sup>3</sup> *Vide ante*, vol. i. 200.<sup>4</sup> Bract. 147 b.

As to the marriage of the parties after conviction, that was to be quite voluntary on the part of the woman, though it was a sort of necessity in the man, in order to save the pains of the law.<sup>1</sup> An appeal against those guilty of *force*, in this crime, might be thus: *Quòd tenuit eam, dum idem B. abstulit ei pucillum suum, or fuit in consilio et auxilio.*<sup>2</sup>

There were only two cases where a woman could bring an appeal: one was this, *de raptu*; the other was, *de morte viri sui inter brachia sua interfecti*. In the latter case, the appeal was always to charge the offence in that special way: *occidit ipsum B. virum suum inter brachia sua, &c.*<sup>3</sup>

In all the foregoing appeals it has been supposed, that the appellee was either in custody, or at least was forthcoming at the trial. When it was not so, there issued a writ of attachment. This, in case of homicide, was, *Si te fecerit, &c., tunc attachiari facias B. per corpus suum*: if in any other of the before-mentioned crimes, it was only, *Si te, &c., pone per vadum et saluos plegios*. Any of the before-mentioned appeals might be removed from before the justices itinerant (to whom it was the course for the parties to have a day given by the county) into the court *coram nobis, vel justitiariis nostris apud Westmonasterium*; for which purpose, a writ of *venire facias appellum* would issue, containing in it likewise a *pone per vadum et saluos plegios* against the appellee. If he did not appear upon any of these attachments, another writ issued, *quòd facias interrogari de comitatu in comitatum*, till he was outlawed, at the king's suit.<sup>4</sup> The above process of attachment was likewise the course if the appeal had been begun in the first instance, as it might have been, *coram ipso rege, vel justitiariis suis de banco*. Did any contest arise about the agreement between the appeal made in the county and that in the superior court, there issued a *recordari facias* to the county, to enable the justices to compare them.<sup>5</sup>

Among other offences we must not omit *theft*, which, since the time of Glanville,<sup>6</sup> had become one of the pleas of the crown. There lay an appeal of this offence not only in the king's great court, but also in the county court, court baron, and others. As this seems to be in violation of the prohibition of *Magna Charta*, it must be considered what sorts of theft were held to be out of the meaning of that act. Theft was either *manifest* or *not manifest*. The latter was, when a person was suspected of theft *per famam patricie*, and where there were strong presumptions appearing against him; of this kind of theft, none could hold plea but only the king in his own courts. But of *manifest* theft, which was when the offender was taken with the thing upon him, and was called *handhabende* and *bacberende*; of this several inferior courts might hold plea.<sup>7</sup>

<sup>1</sup> Bract. 148.<sup>2</sup> Bract. 149.<sup>3</sup> Bract. 150 b.<sup>4</sup> *Ibid.* 148 b.<sup>5</sup> *Ibid.* 149 b.<sup>6</sup> *Ibid.* Vide ante, vol. i. 251.<sup>7</sup> Vide ante, vol. i. 250.

The jurisdiction and judicature of these inferior courts was termed by some very barbarous names. Lords of franchises had cognizance of crimes under the titles of *Sok et Sak*, *Tol et Team*, *Infangethef et Utsfangethef*. *Infangethef* was, when a thief was taken with the thing stolen upon him (*with the manour*, as it has since been termed) within the lord's land, being himself one of the lord's tenants. *Utsfangethef* was, when a stranger was so taken. Thus, these authorities to judge of theft were entirely local, the lord having no power to pursue his own tenants out of his jurisdiction, but yet enjoying a right to question strangers, when they accidentally came within it, under particular circumstances of guilt. Where the thief was not taken *with the manour*, then it belonged only to the king's court to inquire thereof.<sup>1</sup>

Theft is defined by Bracton to be, *contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerit*. The words of appeal were, *Quod in feloniam, et furtivè, et in latrocinio, et contra pacem domini regis cepit rem illam, et furtivè abduxit eam; et quòd hoc fecit furtivè, et in feloniam, offert, &c.* To this the appellee answered, and defended the felony and larceny, either *per corpus* or *per patriam*. If he chose the former, they proceeded as in other cases: if the latter, he might state many things in his defence.<sup>2</sup> He might say, the thing supposed to be stolen was his own, and show the reason thereof; as if it was a horse, he might say it was foaled by one of his mares, and that he bred it; and if this was testified by the country, he was set at liberty, unless the appellor could show by the country and the vicinage, and by some other certain proofs, that it was his foal, and he bred it up; and when a *secta* was thus produced on both sides, that was preferred which was the greater and more deserving of credit. But if both sides were upon an equality as to their *secta* and testimony, then other credible persons were to be called out of the neighbourhood, who were not connected with either of the parties; and for whomsoever they agreed, he was adjudged to be in the right, and so the matter was decided. If the defendant said he bought it, or that it was given him, then he was to call the seller or giver to warrant it. They then proceeded as in cases of vouching to warranty in civil suits. The warrantor, if he appeared, either entered into the warranty, or denied his being bound to warrant; and in that case, the appellee was to prove it against him *per corpus*, and so it was decided by duel. If the warrantor entered into the warranty, then the appeal went on between the appellor and him, and the appellee was discharged. The warrantor might vouch over, and so on. If the warrantor did not appear, there issued not a summons, but a *venire facias*.

If the thing stolen was bought, and the buyer had no warrantor to vouch, there was a distinction between buying privately and

<sup>1</sup> Bract. 154 b.

<sup>2</sup> Ibid. 150 b.



publicly in a fair or market, in the presence of the officers of the market, where a toll was paid; for, in such case, the appellee, upon restoring the thing without receiving back the price, would be discharged from the appeal.<sup>1</sup> It sometimes happened that sturdy fellows, who were best suited to this kind of decision, were hired to warrant: if this appeared to the justices, they might direct it to be inquired of *per patriam*, and such champion was to have his foot and fist cut off. The punishment of theft depended on the value of the thing taken. No Christian man, says Bracton, is to lose his life for a small theft. However, he does not specify the degree of value which made the distinction, as now, between grand and petty larceny, he only says that a thief convict was, according to the value of the thing, either to die, or to abjure the realm, or country, or county, city, borough, or vill; or he was to be *fustigatus*, and then discharged.

It was generally held that a wife should not be charged *ex facto viri*, because, being supposed to be under his power and control, the law, in tenderness, would not make her answerable for a participation *prima facie* in the fact with her husband. Yet if she evidently appeared to make herself an assistant in the felony, as if the thing was found in her own separate custody, she would be considered as a party to the theft. On the other hand, the circumstance of property found in possession of the wife, did not conclude the husband so as to make him a party. Indeed it seemed to depend upon nice circumstances, whether a wife committing felony together with her husband, should be considered as participating in the offence; and whatever privileges were allowed the wife, no concubine, nor any of the family, could claim them.<sup>2</sup> A woman convict, if pregnant, was not to be executed till she was delivered.<sup>3</sup>

Persons convicted of a felony could not bring an appeal against any one. The law pronounced of them *frangitur coram latulus*, meaning that they were disabled from *Of provors.* demeaning the duel in proof of their charge. But it was not so of a *probator* or *provor*, as he was called; for he, though he confessed his crime, was not regularly convicted thereof; and the king would grant such a person his life, upon condition that he would contribute to free the country from felons, either *per corpus*, *per patriam*, or *per fugam*, by causing them to fly. A man who had thus confessed his crime, was to appeal others as accomplices therein. This sort of accusation was kept under some check; for if the person appealed by him was a liege man to some one, and in frankpledge, and had some lord who would vouch for him, and he himself was willing to put himself upon the country; if he was delivered and acquitted by that country, the provor was to be condemned as a liar and convict felon. But if the person appealed was in no decenna, nor had any lord to own him, and had refused to put himself upon the country, as he appeared on the same suspicious

<sup>1</sup> Bract. 151.<sup>2</sup> *Ibid.* 151 b.<sup>3</sup> *Ibid.*



footing with the provor, they then were permitted to wage the duel. So, again, if he had consented to put himself upon the country, and the country had declared him a suspicious person, then, likewise, the duel was to be resorted to.

If a felon confessed his offence before the sheriff and coroners, and became a provor, and still continued, when before the justices, to accuse others, he was to bind himself to convict such a number as he named; and upon those terms his life was granted him. None could admit a man to become a provor but the king, as none but he alone could pardon the pain of death. The judge might do this, as the king's representative in judicature, either by his own authority, or under the direction of a special writ commanding him so to do;<sup>1</sup> in either case, there issued process of attachment against the parties appealed, and so on to outlawry, if necessary.

The words of appeal were: *A. de N. COGNOSCENS se esse lutronem, appellat B. de societate, et latrocinio; quod ipsi simul furati fuerunt, &c.*:<sup>2</sup> to which the appellee answered, *Et B. venit, et defendit societatem, et latrocinium, &c.* The duel was waged, and the oath taken in the same manner, *mutatis mutandis*, as in other cases. If the provor vanquished one, he was to go on with the others. Should the appellee be successful, he was not to be wholly discharged, but, on account of the suspicions arising from the charge, he was to be let out on pledges, unless the justices saw any particular reason for committing him to gaol, as if he was indicted by the knights, or other credible persons. In the former case, if he could not find pledges, he was to abjure the realm, or to remain in gaol for ever;<sup>3</sup> as should the other appealed persons, if the provor died before the duel. The provor, if victorious, was to have his life according to the terms on which it was promised, but was to be sent out of the realm, even though he offered pledges to answer for him.<sup>4</sup> Thus stood the law concerning provors; an expedient in the prosecution of criminals, founded upon the loose state of the police, when malefactors were suffered to associate in great parties, and could not be easily discovered but by setting them one against the other (a).

We have hitherto considered only the higher order of crimes, which were prosecuted criminally, and produced either capital punishment, loss of limb, or banishment, perpetual or temporary. It follows that some notice should be taken of the lesser order of crimes, which were prosecuted civilly. Actions founded upon injuries, as they are called by Bracton (by which are meant actions of trespass), belonged, as well as the former, *ad coronam regis*, inasmuch as they were<sup>5</sup> *contra pacem domini regis*. *Injuria* is

(a) These actions were described in the *Mirror* as "personal actions," not as we should now use the term—meaning actions relating to personality—but actions for injuries, corporeal or incorporeal, to the person: being thus distinguished, on the

<sup>1</sup> Bract. 152.

<sup>2</sup> *Ibid.* 152 b.

<sup>3</sup> *Ibid.* 153.

<sup>4</sup> *Ibid.* 153 b.

<sup>5</sup> *Aliquando*, says Bracton; they sometimes did, and sometimes did not belong *ad coronam regis*.

defined by Bracton to signify anything *quod non jure fit*. Those injuries of which we are now going to speak, were followed by a pecuniary penalty, to which, according to the nature of the case, was sometimes added imprisonment. An injury was not only when a person was wounded, beat, or struck, but also when any slander was spoken of him, or a *fumosum carmen* was made on him. Again, a man might sustain an injury not only in his own person, but in the persons of others who were under his authority, as in those of a wife or children. But though a man might have an action for an injury to his wife, she could not have one for an injury done to him; for though the wife was to be defended by the husband, he was not to be protected by her. A man also might suffer an injury when any was done to his servant, or villein, as if they were any way beaten,<sup>1</sup> and his honour was thereby hurt, or any interruption occasioned to his affairs; for otherwise an action for beating belonged to the servant, and not to the master. An action for injury, or, as it may be more properly called, an action of trespass, lay not only against the person actually striking, but against all procurers and contrivers thereof. This action should be brought immediately, for if the injury was dissembled for any time, such delay would bar the party of his action.<sup>2</sup>

*Vetitum nadium*, or the detention of a *nadium* (now called a distress), was a subject belonging to the jurisdiction of *of vetitum nadium* the king's crown; and cognizance thereof was rarely allowed to any except the king or his justices. But because questions of distress required despatch, on account of the nature of the subject taken, which was sometimes living animals, a special jurisdiction used to be given to the sheriff, who, in this instance, did not act in his office as sheriff, but as *justitiarius regis*. If any one claimed a franchise to hold plea *de vetito nadio*, it was *ut justitiarius regis*, by special grant.<sup>3</sup> The title of distress is passed over by Glanville, with a bare mention of the writs directed to the sheriff commanding him to make deliverance.<sup>4</sup> The learning upon this subject had, since his time, been wrought up into some size and system; a sketch of which, as it now stood, it may be very proper to give.

The questions arising in this plea related either to the *caption* or *detention against gage and pledge*. The caption might be just or unjust. It was just when taken for a service detained by a person who acknowledged it to be due; and in that case the taker might avow the taking; but if the things justly so taken, were detained

one hand, from real actions, and, on the other hand, from what the *Mirror* calls mixed actions—that is, not real, nor relating to the person, but to personality—as actions of debt, contract, trespass to property, real or personal; detinue, and the like. The learned author, therefore, is in error in supposing that this class of actions embraced all actions of trespass; but only trespasses to the person. These actions are also called in the *Mirror* personal actions venial, because supposed to be against the peace, and to partake of the nature of offences, and yet not criminal.

<sup>1</sup> Bract. 155.<sup>2</sup> *Ibid.* 155 b.<sup>3</sup> *Ibid.* 155 b.<sup>4</sup> *Vide ante*, vol. i. 175.

against gage and pledge, after security was offered for payment of the service, and all arrears (or whatever the cause might be, as damage done, some trespass, debt, or the like), then, though the caption might be just, the detention was unjust. If the lord defended the unjust detention, and the plaintiff had at hand his *secta* (a), who all agreed in testifying in support of the fact, then was the defendant to wage his law *duodecimā manu*; and if he failed in so doing, he was *in misericordiā* to the sheriff (for we are now speaking of this proceeding when in the county), and was to restore to the plaintiff the damage he sustained by the detention. Had he succeeded in making his law, he would have gone quit; the cattle would be returned to the lord; the plaintiff would be *in misericordiā* (but without paying damages); and must satisfy the lord for the service due.

Had the question been upon the unjust caption; as for a service which the plaintiff disclaimed, and did not acknowledge to be due, and of which therefore no plea could be held without the king's writ; if the plaintiff showed by a sufficient *secta*, that the taking was for a service which he disclaimed; then, as this was a point upon *the right*, which in a proper proceeding by the king's writ might come to be decided by the duel, or the great assize, there was an end of the suit in the inferior court, and resort must have been made to the writ of right,<sup>1</sup> which was the writ that was afterwards called a writ of right *sur disclaimer*.<sup>2</sup> If the lord had seisin *per manum tenentis* of the service for which the distress was taken, and upon the plaintiff's denying it, this was certified *per patrium*; the plaintiff was *in misericordiā*, and he was to return the cattle to the lord; for in this case, as there was a recent seisin, they could not possibly come to the duel, or the great assize. But should the inquest find that the lord had not seisin *per manum tenentis*, then *he* was to be *in misericordiā*; the plaintiff was to recover his damages; the cattle delivered were to remain in his

(a) "Secta" were suitors of the court prepared to testify for the party. It is said in *Flota*, that the rule which required the party to produce his "secta"—i.e., his suit or following of witnesses, was derived from the clause in *Magna Charta*: "Nullus liber homo ponitur ad legem nec ad juramentum, per simplicem loquelam, sine testibus fidelibus ad hoc ductis" (*Flota*, 137). Whether this meant witnesses who were to be sworn to declare the truth, or were to be examined as witnesses before the jury, is not quite clear; in either case there is a difficulty. In the one case, the parties would appear to choose the jurors; in the other view, jurors upon evidence must have already arisen: though, indeed, both systems could be united; and some of the jurors testify to their fellow jurors: and this seems indeed to have been the system. As to compurgators, they clearly were produced by the party who was to wage his law. That was the origin of wager of law, as it was called—twelve men being required, as Lord Coke explained, including the defendant, because every trial by compurgation was to supersede a jury (2 *Inst.*) and so compurgators were equal to a jury, including the defendant, who was one of them. Thus the defendant himself might be one of the compurgators, and thus put in place of a juror; and there does not seem any difficulty in supposing that his "suit" were examined, as witnesses and jurors before the other jurors, and that these gave their verdict on the testimony of the others.—(Vide first part). This seems the real origin of trial by jury.

<sup>1</sup> Bract. 156.

<sup>2</sup> O. N. B. 167.

hands; and the lord had no redress but some writ in which he might try the right by the duel, or the great assize. In like manner, should the tenant die, and the heir deny the service, the lord might allege against him a recent seisin thereof *quasi per manum tenentis*, if he had seisin thereof a year and day before the tenant's death.

Complaint might be made both of the unjust caption and detention; and when the complaint was of this sort, and the defendant denied both, if one was found for the plaintiff and one for the defendant, one party was to be *in misericordiâ* as to one, and the other *in misericordiâ pro falso clamore*, as to the other. If the lord made default after he had waged his law, or had failed in his endeavour to make it, the cattle were to be delivered to the plaintiff, whatever might be the event of the suit.

The subject of replevin and distress will be understood better if we trace it from its commencement through all its stages. When any one had a complaint that his cattle were taken, or detained against gage and pledge, he either applied for a writ commanding the sheriff *quod replegiari facias*, as we saw in Glanville's time;<sup>1</sup> or made a verbal complaint to the sheriff, who, upon having security *de proseguendo* properly given, would, without a writ, proceed to make replevin. The manner of replevying was this: The sheriff went in person, or sent one of his officers, to the place where the cattle were detained, and demanded a sight of them. If this was denied him, or any violence was done to prevent it, he might immediately raise a hue and cry, and apprehend the offenders, as persons who acted in manifest violation of the king's peace, and put them in prison. If he could not find the cattle to make deliverance of them, and it appeared that they were driven away; then, if the taker had any land and chattels in the county, the sheriff's officer was to take some of his cattle to double the value, and detain them till the distress was brought back, which, in after times, was termed *a taking in withernam*. If the taker had no land or chattels within the county, as the sheriff's power could reach no further, recourse must be had to a writ of attachment, as follows: *Si A. fecerit, &c., pone per vadium et salvos plegios B. quid sit eorum justitiaris nostris apud Westmonasterium, &c., ostensurus quare cepit averia ipsius in comitatu, &c., ubi idem B. non habet terras nec tenementa, et ipsa fugavit à predicto comitatu, &c., usque ad comitatum tuum in fraudem, extra potestatem vicecomitis, &c., et ibidem ea detinet, contra pacem nostram, ut dicit, &c.*<sup>2</sup>

If no opposition was made to the sheriff, or his officer, but he was suffered to have a sight of the cattle, he was immediately to cause them to be delivered to the complainant; and then he gave a day to both parties, to appear at the next county, that the taker (who could not deny the taking against the sheriff's testimony, he, in this case, having the authority of a record) might show his

<sup>1</sup> *Vide ante*, vol. i. 175.

<sup>2</sup> *Bract.* 157.

taking to be just ; and the complainant, that it was unjust. At the day appointed in the county, the taker could have no essoin, as an unjust taking and detention against gage and pledge was considered in the unfavourable light of a robbery, and was held to be against the peace, even more than a disseisin was. At the day, the taker was to state his reasons for the caption.

The grounds upon which a justification for taking cattle might be rested were many. It was very common, in these times, to justify under the judgment of the lord's court, where it often happened there had been some compulsory proceeding to recover the duty in question. Thus the taker might say, that *justè cepit*, and *per considerationem curie suce, pro servitio quod idem querens, et tenens suus ei debuit, et ei injustè detinuit* ; for which he might vouch his court to warranty, if he pleased, and deny that he detained it against gage and pledge. To this the plaintiff might reply, *quòd ille injustè cepit, et detinuit* ; "because, being summoned to appear in the defendant's court to answer for certain services and customs demanded of him, he there said he owed him no services, and demanded judgment, if he was to be put to answer without the king's writ, in a matter that touched his freehold ; and yet, nevertheless, the defendant took his cattle, and distrained them for a service which he did not admit to be due, and when he demanded his cattle, he refused to deliver them ;" *et de hoc pradu-cit sectum*, which was to consist of credible persons, who were present in court.<sup>1</sup> If they agreed in maintaining what he had said, then the court was summoned ; and if that agreed with the *secta*, then there remained nothing but to inquire whether the distress was made by judgment of the court, or by the lord's own voluntary act. If the former, then the court was *in misericordiâ*, for its false judgment ; if the latter, then the lord was *in misericordiâ* ; and in both cases the cattle remained with the person to whom they had been delivered. If there had been no proceeding in the lord's court, and he justified for service due, then they proceeded as before mentioned, observing the above distinction, where the service demanded was a question of *right*, and where of *recent seisin*.<sup>2</sup>

The defendant might avow the taking to be just, because he had a freehold in which neither the plaintiff nor any one else had a right of common, or other easement, and yet the plaintiff had put his cattle there without any right, and therefore he took them ; though he was ready to restore them, if the plaintiff would abstain from the like trespasses, which he refused to do. To this the plaintiff might reply, that the taking was unjust, because he had a right to common there, which he was ready to show as the court should direct ; and therefore it was, that he would not find pledges to obtain a release of his cattle. When the suit was brought to this issue, the county court could proceed no further in it, and the cattle were to remain with the person to whom they had been delivered.

<sup>1</sup> *Vide ante.*

<sup>2</sup> *Bract. 157 b.*

If the plaintiff still persisted in exercising the right, the defendant, could he not otherwise defend himself, might have an assize of freehold, or the plaintiff an assize of common.

The defendant might say, that the taking was just, because he found them *damaged feasant*, or doing damage in his land, and therefore he impounded them, as by the law and custom of the realm he might do, till satisfaction was made him; that the plaintiff would not make satisfaction, nor give security for it; nor did he demand them upon gage and pledge; or, if he did, they were tendered to him: and of all this the defendant was to produce his *secta*. If the plaintiff meant to deny the whole, he was to *defend* it (for so Bracton expresses himself, as if he considered the plaintiff, in this situation, in the light of a defendant) *per legem*. If he meant to reply to any particular parts of the defendant's answer; as, that though they were taken lawfully by the defendant, yet they were detained unjustly against gage and pledge, for he came with other credible persons to the defendant, and offered to make amends, which he refused, and still detained the cattle; then, in either of these cases, he was to produce a sufficient *secta*: and if the defendant meant to deny the whole of the reply, he was to wage his law; so that then law would be waged on both sides. If the plaintiff denied that any damage was done, or that any was shown to him when he tendered amends, then the defendant was to produce a *secta*, to prove that he took them *damage feasant*.<sup>1</sup> Where a defendant justified for service due, if the plaintiff said there was nothing in arrear, and produced a sufficient *secta* to prove it, the taking being thus proved unjust, the defendant could not defend himself *per legem*.<sup>2</sup>

If a servant had taken cattle in the absence of his lord, and, when they were afterwards demanded of the lord, he refused to deliver them upon gage and pledge, then they were both liable, the one for the caption, the other for the detention; and if he avowed the caption, this did not free the servant, but both of them became answerable for the servant's act.<sup>3</sup> When the cattle had been once delivered by the judgment of the county court, they were not to be taken for the same cause, till the suit was determined; and if any should presume to take them again, it was considered as a breach of the peace, and there issued a writ, stating specially what had been done therein, and commanding the sheriff, *quòd habeas eorum justitiariis ad primam assisam, &c., corpus ipsius B. ad respond de secundâ captione, &c.*, or the party might be heavily amerced in the sheriff's court, *coram te, et coram custodibus placitorum coronæ nostræ, ut castigatio illa in casu consimili aliis timorem tribuat delinquendi*, as one of the forms of this writ expresses it. This second caption, or, as it was afterwards called, *recaption*,<sup>4</sup> as well

<sup>1</sup> Bract. 158.

<sup>2</sup> *Ibid.* 158 b.

*Ibid.*

<sup>4</sup> This writ of Recaption is said by the O. N. B. to be by the Stat. Marl. c. iii., but we see it was at the common law.

as the first, was to be proved by examining the *secta* produced on both sides.<sup>1</sup>

Sometimes chattels were demanded under the name of *averia*; as where any one had begun to hedge, or raise a fence upon another's soil, and had brought a cart, horses, and tools there; if these were detained against gage and pledge, the question might be brought into the county court, in the above way. But here, if the plaintiff said the *locus* was his freehold, the jurisdiction of the county failed, and recourse must be had to an assize of novel disseisin; and in the meantime the things were to be returned.<sup>2</sup>

Thus have we travelled through the learning and practice of the reign of Henry III. It is with regret that we must here take leave of an author who has been our constant and faithful guide through the intricate paths of this long pursuit. From the time we are deserted by Bracton, we are left to make the remainder of our inquiry with such information as can be collected from many different sources. Instead of having the whole of the law of any particular period laid open to our view in a systematical manner, we must be content, except in a very few instances, to pick out the following part of our narrative from statutes and records, year-books, and other compilations.

It appears from the investigation which we have just been making, that, notwithstanding the civil commotions of this reign might perhaps, in some particular cases, interrupt or suspend the full execution of the law, the learning of it was advanced to a very high degree. The great pains bestowed by Henry II. (*a*) in establishing our law, and improving the administration of justice, enabled it to take deep root, and support itself through the reigns of Richard and John, though not assisted by any particular regard from those

(*a*) There is no evidence that he or any other of the Norman kings took any interest at all in the law or in the administration of justice, otherwise than as a source of revenue or a means of oppression; and it has been shown elsewhere, and is indeed suggested by the author himself elsewhere as to John, that the only interest they took in the subject is to be ascribed to those motives. All the improvements in the law and the administration of justice in these times will be found to have emanated from the able men who were appointed to the office of chancellor or justiciary, especially the celebrated Glanville. The justices itinerant were sent not only to hear pleas of the crown and common pleas, but to assess "tallages" upon the tenants of the king's demesnes, and collect fines and amercements and other sources of revenue, and their executions and oppressions were often so infamous and intolerable, that their approach was dreaded; and in the year 1261 (45 Hen. III.), we find from a contemporary chronicler that a county remonstrated against their coming, because seven years had not elapsed since their last visit (*Ang.-Sax. Laws*, i. 495). As regards the administration of justice in general, in this age, it certainly had attained a certain degree of settlement and regularity. Thus, for instance, that separation of the law from the fact, and that distinction of the functions of the jury and of the judges, which form the foundation (as Sir J. Mackintosh observes) of our system, had become well understood. In the *Placitorum Abbrreviatio* there is an entry in the 6 Richard I., that "subjudicibus licet contentio fuit, citrum carta pradieta debet tenere versus puerum que infra statum" (*Plac. Abr. 5 War. temp. Rich. I.*). And again, in the fourth year of king John, the jury, upon an inquisition, declare, "non pertinet ad eos de jure discernere" (*Plac. Abr. 40; Linc. Temp. 4 Johan.*) "Veritas habenda est in juratore

<sup>1</sup> Bract. 159.

<sup>2</sup> *Ibid.*



monarchs. In this reign it had acquired a stability, which withstood every discouragement and check from the turbulence of the times.

The study of the civil and canon law had contributed to further this improvement, and to furnish considerable accessions both of strength and ornament. Those two laws, besides exciting an emulation in the professors of the common law to cultivate their own municipal customs, afforded from their treasures ample means of doing it. Much was borrowed from thence, and ingrafted on the original stock of the common law. But the manner in which this was done is very remarkable. Though our writs and records are in the language in which the Roman and pontifical jurisprudence were written and taught, there is not in either the least mark of imitation; the style of them is peculiarly their own (*a*). The use made

justicia et judicium in iudice. Videtur tamen quod aliquando pertinet iudicium ad juratores, cum dicere debent si talis disseisiverit talem vel non disseisiverit; et secundum hoc videtur iudicium. Sed cum ad iudicium pertineat justum proferre iudicium et reddere, oportebit eum diligenter deliberare et examinare, si dicta juratorum in se veritatem continent, et si eorum justum sit iudicium vel fatum" (*Bracton de Legibus*, lib. iv. p. 187). "Item sic ad justiciarium pertinet delegentissima examinatio, ita pertinet ad eum justa sententie prolatæ sed ante iudicium examinare debet factum, et dicta juratorum, ut securi possit procedere ad iudicium" (*Ibid.*) So the administration of justice had become so far regular that an order of advocates was already established. Bracton makes express mention of counsels, pleaders, and advocates in the reign of Henry III. (*De Legibus*, lib. v. fol. 412 a, 372 b). And more but advocates were allowed to appear, as is proved by an entry in that reign upon the rolls: "Abell. de Sancto Martino venit et narravit pro Episcopo et non fuit advocatus: Ideo et in misericordia custodiatur" (*Plac. Abr.*, 137; *Kanc. rot.* 22, temp. 32 Hen. III.). But, for all this, the administration of justice was far from being as yet firmly established in point of purity or impartiality, and it was still open to the grossest perversion and corruption, arising from the influence either of the sovereign or powerful persons, inasmuch that we find repeatedly in this reign the barons deemed it necessary to appoint knights to go round with the itinerant justices to observe and report how they administered the law. An admirable illustration of the state of the administration of justice in that age is afforded by the following passage from one of the chronicles. The chronicler states certain injuries which the abbey of St Albans had sustained from some person under the protection of one Mansel, and he then goes on thus: "Nec quicquam juris vel ultionis assistente memorato Johanne Regis lateribus et conciliis, potuimus obtinere. Quinimo metus et persuasio ipsius Johannis omnium Justiciariorum et placitantium advocatorum (quoniam Banci narrantores vulgariter appellamus) ora penitus obtoravit, ita, ut multo totiens oportuit Dom. Willielmum tunc cellarium (visum scilicet circumspectum et faciendum) suum sermonem et querelam in persona propria coram Justiciariis imo etiam coram Rege proponere. Et protestati sunt Justicarii, secretum in aures dicti, Dom. Willielmo instillantes, quod duo tunc temporis in regno dominabantur, scilicet comes Ricardus et Johannes Mansel, contra quos, non audebant sententio" (*Matt. Par. Hist.*, p. 1077). That is to say, that they *durst* not do justice against them.

(*a*) It is conceived that this is an error. The very idea of such fixed, formal requisites of actions is evidently borrowed from the *formula* of the Roman law. Their whole style, in their severe compressed brevity, is evidently framed upon those models, and in many instances there is an exact conformity even in expression. Take, for instance, those well known and essential words of the writ of trespass: "*vi et armia*;" they are evidently borrowed from the *formula* founded upon the *Lex Julia* as to *vi*. A learned author, in an interesting note on the subject, cites from a French writer some instances of writs used in French courts in order to show a French origin for the system. The writs cited, however diffuse and narrative in their style, are as unlike ours as possible, and, moreover, were evidently only French adaptations of the Roman usages. Ours adhered far more closely to the Roman



of the civil and canon law was much nobler than that of borrowing their language. To enlarge the plan and scope of our municipal customs; to settle them upon principle; to improve the course of our proceeding; to give consistency, uniformity, and elegance to the whole; these were the objects the lawyers of those days had in view: and to further them, they scrupled not to make a free use of those more refined systems. Many of the maxims of the civil law were transplanted into ours; its rules were referred to as parts of our own customs; and arguments grounded upon the principles of that jurisprudence were attended to as a sort of authority. This was more particularly so in what related to personal property; while the law of descent, the inquiry *per fumam*, purgation, wager of law, and other parts of our judicial proceedings, seem borrowed from the canonical jurisprudence.

A considerable accession had been made to the original canon law contained in the *Decretum of Gratian* by the publication of the *decretals* of Gregory the Ninth, which happened during this reign. This must have given new vogue and reputation to canonical studies; and, no doubt, encouraged the commentators of this age to pursue their inquiries, in that way, with more freedom. The application they made, whether of the canon or civil law, in treating subjects of discussion in the law of England, is visible from the account just given from Bracton. To consider particularly, how originals, and the learned writer alluded to evidently thought that our writs were of Roman origin, for he thus concludes his elaborate note on the subject: "One of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate *formula* of complaint, or claim—a method devised with a view, probably, to the more certain definition of the nature of those injuries for which the law afforded redress, and perhaps also to save the trouble of inventing new modes of expression for each particular case of wrong as it arose. Whatever the object, it is certain that such was the practice of ancient Rome, and that from a period almost as early as the formation of the laws of the Twelve Tables (*Dig.*, lib. i. tit. 2, *Cic. pro Rosc. Com.*, c. viii.); and so severely were these formulæ observed, that any deviation from them was fatal to the cause. This strictness evidently tended to injustice, and we accordingly find that it was banished from the Roman law by Constantine, who abolished the judicial formulæ (*Quint.*, lib. vii. c. iii.). Yet form was not altogether extirpated. Certain general distributions of the subjects of litigation were recognised under the title of *actions*, and considerable attention continued to be paid to the frame and wording of the complaint (*Just.*, lib. iv. tit. 6). When, therefore, we find the rude judicature of the nations who were in possession of Europe at the fall of the Roman Empire exhibiting, at a very remote period, the same contrivance of fixed judicial formulæ, we are naturally led to refer it to an imitation either of the ancient or more modern system of their predecessors" (*Stephens on Pleading*, note 2). It is impossible not to perceive that the learned writer was of opinion that our writs were derived from the Roman law, and that his opinion was correct. They were, it may be added, issued under the Romans by the prætor, and ours were issued by the chancellor. So the whole system of pleading was derived from the Roman law. Bracton has a chapter devoted to it, headed "*De Exceptionibus*," a phrase borrowed from the Pandects; and he uses the phrase "*litis contestatio*," which is taken from the civil law, and means, in substance, an issue. The terms used in pleading—"narratio," or "intentio," "exceptio," "replicatio"—were used by the civilians and canonists (*Dig.*, lib. xlv. tit. 1, s. 2; *Corv. Jus Canon.*, lib. iii. tit. 32). Thus Bracton says: "*Usque ad litem contestationem, scilicet quousque fuerit præcise responsum intentioni petentes, et ita quod tenens se posuerit in assisum*," &c. (172, a). It is obvious that Bracton had the right idea of the real practical object of pleading—viz., to eliminate and define the real point in dispute.

much of the latter is indebted to those two systems, either for its origin or improvement, would lead us into a larger field than our present design could allow. It seems to be an object of a separate consideration; and might, perhaps, make a proper appendage to a History of the English Law.

The Book of Feuds was published during this king's reign, about the year 1152; and the particular customs of Lombardy as to feuds began to be the standard and authority to other nations, on account of the greater refinement with which that kind of learning had been there cultivated. It is probable that compilation was known here, but it does not appear that it had any other effect than influencing our lawyers to study their own tenures with more diligence, and work up the learning of real property with much curious matter of a similar kind. Thus, tenures in England continued a peculiar species of feuds, partaking of certain original qualities in common with others, but, when once established here, growing up with a strength and figure entirely their own. While most of the nations in Europe referred to the Book of Feuds as the grand code of law by which to correct and amend the imperfections in their own tenures, there is not in our law-books any allusion that intimates the existence of such a body of constitutions. To trace out the affinity between the Law of Feuds which prevailed with us, and that which governed in Lombardy and other parts of the continent inhabited and settled by the German invaders, would be a subject of very curious inquiry; but this likewise, for the reasons before given, must be passed over in silence.

As study was encouraged, and the learning of the law advanced, a curious anxiety to improve imperceptibly led to refinement. The scholastic logic of the times was affected by all persons who wished to have the appearance of learning. The law, a disputation science, naturally adopted the prevailing fashion, and our courts, like our universities, were filled with subtlety of argument and captiousness of exception. In the reign of Henry III. this rage of minute refinement had infected all branches of the law, and made almost every part of our jurisprudence in the highest degree artificial and complex.

Having taken a view of the law as it stood in the fiftieth year of this reign, it follows now that we should mention the statutes made subsequent to that period. The first of these is the *assisa panis et cervisie*, made in 51 Hen. III. stat. 1, containing many provisions on the subject from which it is entitled. To this statute another of the same year, entitled *judicium pillorie*, may be considered as supplemental. In the same year follow two statutes relating to the days of appearance in court, which deserve more particular notice. The first is entitled, *Dies communes in banco*. *in banco*, generally in all real actions; the other is entitled, *Dies communes in banco in placito dotis*. These two acts afford us the first opportunity of speaking particularly concerning the days for return of writs, and continuance of proceedings, in term.

We have already seen that writs were returnable at certain stated days in different seasons of the year.<sup>1</sup> These returns, or *termini ad quos*, when they fell very near together, collectively constituted a period of legal business, which was called generally *terminus*, or *term*, during which the returns were seldom more than seven or eight days distant from each other. It has not yet appeared that any precise rule was settled, by which a writ was required to be returnable at any one of these stated days in preference to another. Indeed, in the early times of our law, there does seem to have been some difference between the length of time allowed to persons summoned. In a law of one of our Saxon kings, it is directed, that if the party dwelt one county off, he should have one week; if two counties, two weeks; and so, for every county a week.<sup>2</sup> The same is laid down by a law of Henry I., with a restriction not to go beyond the fourth week, *ubicunque fuerit in Angliâ*; but if the party was beyond sea, he might have six weeks.<sup>3</sup>

There is no intimation, either in Glanville or Bracton, of any such rule prevailing in their times. It is not, however, unlikely that the returns, in the time of the latter, might nearly correspond with the scheme laid down by the statute of *dies communes in banco*. But this act does not give us entire satisfaction on that head; for, being only a direction to the justices *in banco* how to fix the returns of process which they issued in consequence of the return of some other writ, we are still uninformed as to the rule that governed in the return that was to be affixed to original writs. These, we know, might be obtained in the office of the chancery any day in the year. Whether they were made returnable at the pleasure of the clerks who penned them, or at the option of the purchaser, as is more probable, or whether a certain rule subsisted in the chancery office on this head, we are not able to collect (*a*). When the original was once returned *in banco*, the rule for making

(*a*) It appears that there had been a fixed period of fifteen days substituted for the variable period formerly allowed for appearance, in order that the defendant might know when he was bound to appear, and that the plaintiff might know when there was a default; and, further (as appearance in that age was personal), that certain days were appointed for returns and appearances, for the convenience of the court and the suitors. In the *Mirror of Justice* it is said to be an abuse to summon men without giving them reasonable warning upon which to answer (c. v. s. 6), and in the chapter describing writs, it is observable that no return day is mentioned. In another article it is said that after fifteen days no default should be allowable (c. v. s. 10, art. cviii.), and that in Alfred's time the process was "hasted" from day to day—that is, that it ran on, *de die in diem*, without any arbitrary return-days. The original practice, no doubt, was to allow a reasonable time for appearance, and reckon default, if there was no *essoin* or excuse, upon non-appearance, on the lapse of that time. But in course of time, appearance being personal, it became convenient to fix specific days for appearances and returns to writs, as otherwise the business of the court would be daily disturbed by appearances, &c. Thus it should seem that fixed return-days were an incident of personal appearance, and, when appearance ceased to be personal, were only an inconvenience, and probably would have disappeared, but for the tenacity of

<sup>1</sup> *Vidi ante*, vol. i. 191.

<sup>2</sup> *Leges Etheld.* c. 93.

<sup>3</sup> *Leg. Hen. Prim.*, c. 141. *Vide Spelm. on Terms*, s. 5, ch. 6.

the return of process upon it, and process upon that process, was as follows.

The statute of *communes dies in banco* directs, that if a writ came (according to the language of those times, or, as we should say now, was returned) *in octabis* of St Michael, a day should be given (that is, the writ which issued upon it should be returnable, and there should be a *dies datus partibus*) *in octabis* of St Hilary; if *in quindenā* of St Michael, day should be given *in quindenā* of St Hilary. If a writ came in three weeks of St Michael, day was to be given *in crastino Purificationis*; if in a month of St Michael, *in octabis Purificationis*; if on the morrow of All Souls, *in quindenā* of Easter; if on the morrow of St Martin, in three weeks of Easter; if *in octabis* of St Martin, in a month of Easter; if *in quindenā* of St Martin, in five weeks of Easter. There was a special day given *in crastino Ascensionis*, which countervails (says the act) the same as in five weeks of Easter. If a writ came *in octabis* of St Hilary, day was to be given *in octabis* of the Holy Trinity; if *in quindenā* of St Hilary, *in quindenā* of the Holy Trinity, and sometimes *in crastino* of St John the Baptist; if on the morrow of the Purification, *in crastino*, or *in octabis* of St John the Baptist; if *in octabis* of the Purification, *in quindenā* of St John the Baptist; if *in quindenā* of Easter, *in octabis* of St Michael; if in three weeks of Easter, *in quindenā* of St Michael; if in a month of Easter, in three weeks of St Michael; if in five weeks of Easter, or on the morrow of the Ascension, in a month of St Michael; if *in octabis* of the Holy Trinity, on the morrow of All Souls; if *in quindenā* of the Holy Trinity, or on the morrow of St John the Baptist, on the morrow of St Martin; if *in octabis* of St John the Baptist, *in octabis* of St Martin; if *in quindenā* of St John the Baptist, *in quindenā* of St Martin. Such is the manner in which these continuances connected one term with another. The returns that intervened between the issue and return of a writ were generally eight or nine, and the space of time about five or six months.<sup>1</sup>

If the process in any of the many actions which we have considered in the course of this reign was compared with this scheme of continuances, we should then see what a length of time must often be consumed before a party could be brought into court (a).

any usage once established, and especially sanctioned by statute. And the ordinance under consideration, though one of those which Hale enumerates as not a statute of record, and possibly not acts of parliament at all, yet obtained in use as such (*Hist. Com. Law*, c. vii.). These return-days were modified by 1 W. 4, c. lxx., and abolished by the Uniformity of Process Act, 2 & 3 W. 4, c. xxxix.

(a) And there can be no doubt that all this elaborate system of process had been devised by astute and servile lawyers for the mere purpose of creating occasion for further fees at each successive stage of the process. For, be it observed, that every

<sup>1</sup> How these differ from the terms in former times, *vide ante*, vol. i. 192. It appears, that in the time of Glanville there were the three following returns in Easter term—viz., *In crastino post octabus clausi Pasche*—a *crastino octabis clausi Pasche* *in quindenā dies*—a *clauso Pasche* *in quindenā dies*. Glanv. lib. i. c. 6, 19, 15. *Vide also* Spelm. on Terms.

We shall content ourselves with one example, namely, the process in a personal action, as given by Bracton.<sup>1</sup> Suppose a summons in a personal action was returnable *in octabis Michaelis*, the 6th of October, the process of attachment issued upon that would be returnable *in octabis Hilarii*, the 20th of January. If the party did not appear, there issued a second attachment *per meliores plegios* returnable *in octabis Trinitatis*, the 19th of June. If he did not then appear, there issued a writ of *habeas corpus* to take the body, returnable *in crastino Animarum*, the 3d of November. Thus ended the *solemnitas attachiamentorum*, and so passed away a full year and almost one month.

If the sheriff returned upon this last writ, as it was probable he would, *non est inventus*, they then resorted to the process of distress, and a *distringas per terras et catalla* would issue, returnable *in tres septimanas Paschæ*, the 8th of May. If he did not appear to this, there issued another *distringas*, returnable *in quindena Michaelis*, the 13th of October. If he did not appear, another *distringas* issued, *ne quis manum apponat*, returnable *in quindena Hilarii*, the 27th of January. If he still did not appear, another writ issued for a caption into the king's hands, returnable *in quindena Trinitatis*, the 26th of June, or *in crastino Sti. Johannis Baptiste*, which happens sometimes on the same day. And here ended the distress *per terras et catalla*, and the space of one year and more than seven months; so that the whole of this process, from the return of the summons to the return of the last *distringas*, would continue two years and more than eight months.

This is the utmost length to which the above process might be extended if no essoin was cast; but if any essoins intervened, and they were managed with dexterity, particularly if the parties could essoin *simul et vicissim*, the appearance in court might be still further protracted. Delays were not at an end, even after appearance. In real actions, we have seen how frequent occasion there was for summons and resummons, upon all which essoins might be cast. In all actions, whether real or personal, there were writs of *venire*, and other judicial process, together with *dies dati partibus*. The delay that might be procured by all these must have placed the issue, judgment, and execution at a great, uncertain, and almost unlimited distance.

Judicial process, like a *venire*, which issued merely out of the

writ meant a *fee*, and therefore the more writs there were, the better for the king's revenue, which, as already observed, and as suggested by Lord Hale, and hinted by the author, was the great object of the interest shown by the Norman sovereigns in the administration of justice. It was, as Lord Hale observes, the rapacious and unscrupulous John who showed most attention to the subject, and there can be little doubt that this lengthening and elaborating of the process had its origin in motives of that kind, and that this system it was which was alluded to in *Magna Charta*, and is repeatedly complained of in the *Mirror*, as tending to *delay justice*—the delay in fact often amounting really to *denial*.

<sup>1</sup> *Vide ante*, vol. i. 480, &c.

record, might not perhaps be considered as strictly within the statute, which, in the terms of it, is literally confined to the issue of a writ upon the return of a former. It is, therefore, not improbable that, in such cases, the justices exercised a discretion to shorten the intervals of the continuances, in the same manner as we know they had, very freely, in lessening the number of them.<sup>1</sup> At any rate, the return of a *venire facias* for summoning jurors must have been accommodated to the seasons within which such trials could be had. The *dies datus*, we know, was left not only to the discretion of the court, but to the election of the parties; hence *dies amoris*, and *dies datus consensu partium*.

In general, however, the justices were tied up to the times prescribed by the statute. This produced great inconvenience, to remove which the legislature interposed both in this and the following reign.

In the very same year an act was passed, by which the writ of dower was made an exception to the above scheme of continuances; for, in that, days were to be given at much shorter intervals, in order that widows might not be delayed in recovering the maintenance which the law had provided for them. If a writ of dower came in *octabis* of St Michael, day was to be given only to the morrow of All Souls; if in *quindenâ* of St Michael, to the morrow of St Martin; if in three weeks of St Michael, in *octabis* of St Martin; if in a month of St Michael, in *quindenâ* of St Martin; if on the morrow of All Souls, in *octabis* of St Hilary; if on the morrow of St Martin, in *quindenâ* of St Hilary; if in *octabis* of St Martin, on the morrow of the Purification; if in *quindenâ* of St Hilary, in *octabis* of the Purification; if in *octabis* of St Hilary, in *quindenâ* of Easter; if in *quindenâ* of St Hilary, in three weeks of Easter; if on the morrow of the Purification, in a month of Easter; if in *octabis* of the Purification, on the morrow of the Ascension; if in *quindenâ* of Easter, in *octabis* of the Holy Trinity; if in three weeks of Easter, in *quindenâ* of the Holy Trinity; if in a month of Easter, on the morrow of St John the Baptist; if in five weeks of Easter, in *octabis* of St John the Baptist; if on the morrow of the Ascension, in *quindenâ* of St John the Baptist; if in *octabis* of the Holy Trinity, in *octabis* of St Michael; if in *quindenâ* of the Holy Trinity, in *quindenâ* of St Michael; if on the morrow of St John the Baptist, in three weeks of St Michael; if in *octabis* of St John the Baptist, in a month of St Michael; if in *quindenâ* of St John the Baptist, then on the morrow of All Souls. These intervals, as may easily be seen, were much shorter than those appointed by the former statute to be observed in all other actions; we shall find that many other exceptions were made thereto in succeeding parliaments.

These are followed by two statutes concerning the exchequer, both passed in the same year; the first is entitled *De Districcione*

<sup>1</sup> *Vide ante*, vol. I. 355, 356.



*Scaccarii*, the other *Statutum de Scaccario*. The former speaks of the damages sustained by the commonalty of the realm through the wrongful distresses which had been taken by sheriffs and other bailiffs of the king, for the king's debts and for other causes. To remedy such evils, the statute ordains generally, that when a sheriff, or any other man, took the beast of another, the owner of the beasts might give them their feed without disturbance, so long as they were impounded, and should pay nothing for their keep; nor was the distress to be given or sold within fifteen days after the taking. It further ordains, that no one shall be distrained by the beasts that plough his land, nor by his sheep, so long as other distress or chattels can be found sufficient whereof to levy the demand; which provision, as well as the former, has been construed to extend to the distresses of private persons as well as to those of the king. But this exception of beasts of the plough and of sheep seems not to relate to cattle *damage feasant*, which were still to be taken according to the old custom of the realm. It was moreover required, that all distresses should be reasonable, and according to the value of the demand. The remainder of this statute, and the whole of the other, is confined to the collection of the king's debts, and the accounting for them in the exchequer. After these statutes, in the same year, follows the *Dictum de Kenilworth*, and then the statute of Marlbridge or Marlborough, 52 Henry III., containing some provisions of a miscellaneous kind, which deserve more particular observation.

This statute was made after the long contest between the king and his barons had subsided, and the nation began to breathe from the disorders of civil war. During this period, many abuses had prevailed, some of which it was intended to remedy by this statute.

Of all the oppressions that were felt from the doctrine of tenures, none bore so hard upon landholders as the claim of wardship (a). Many devices had been practised to defraud lords of this valuable casualty. One of them was this: A tenant would, in his lifetime, infeoff his eldest son and heir, being within age; in consequence of which, as there was no descent of the land, there could be no ward of the infant in case the father should die. It was declared by this act that no lord should lose his ward by reason of such feoffment. Another way was, to make a feoffment in fee, reserving no rent, but supposing the feoffer to be satisfied for a certain term, which,

(a) Under which their children were committed to mere strangers. The following, for instance, is a curious illustration of the feudal system, under which a mother could be sued for letting her own child go with her away from his guardian. The action was for entering the plaintiff's court and taking away his ward, and the defendants, one of whom was the child's mother, pleaded, "quod ipsi fuerunt versus Oxon, et tunc viderunt prædictum puerum, et puer percipit quod prædicta Isabella, (one of the defendants), fuit mater sua; et secutus est eam, usque domum suam, et adhuc moram facit cum ea, sed ipsi eum non duxerunt," &c. On these facts the court held, however, that the mother, with the rest of the defendants, was guilty—guilty of taking her own child (*Plac. Abr.*, 136, *Buck.*, temp. Hen. III.)

upon calculation, would end when the heir came to full age; and then it was conditioned that the feoffee should pay a certain sum, being much more than the land was worth: as none would give so high a price, the heir used to enter by virtue of the original condition: but it was now declared that no lord should lose his ward by reason of any such feigned feoffments. Yet lords were not to be empowered to disseise persons infeoffed in that way; but they were to proceed by a writ to recover the custody. The trial, whether such feoffments were made *bonâ fide*, or in fraud of the lord, was to be by the witnesses contained in the deed of feoffment, and other free and lawful men of the country. Should the lord have judgment to recover his ward, the feoffees were still to have their action to recover the term or fee which they had therein when the heir came of age. On the other hand, it was provided that, should any lord implead feoffees, who were *bonâ fide* such, under pretence of the above-mentioned collusion, they should have their damages and costs, and the plaintiff should be amerced.<sup>1</sup>

A provision in protection of heirs against the intrusion of their guardians was partly a new regulation, and partly a declaration and confirmation of the common law. First, it was enacted, if a lord having wardship of an infant's lands would not restore them when he came of age, the heir might have an assize of mortdancestor, and recover the damage he had sustained by the withholding of the land since his coming of age.<sup>2</sup> It was moreover declared and enacted, that where the heir was of full age at the death of the ancestor, the lord should not put him out, nor remove anything, but only take simple seisin thereof (for so *relief* was sometimes called), in acknowledgment of his seignory; and if such an heir was put out, and had recourse to a writ of mortdancestor, he should be entitled to his damages, as in an assize of novel disseisin. It was declared that the king was to have the *prima seisin*, or *primer seisin* (which corresponded with *relief*) of his tenants *in capite*, as was used in times past; nor was the heir to have it till he had first sued livery of the land out of the king's hands, as his ancestors had before done. This was to be understood of lands and fees which used to be in the king's hands by reason of knight's service, serjeanty, or *juris patronatus*—that is, of the foundation of bishoprics, monasteries, and the like.<sup>3</sup> So great havoc had been made in the rights of persons, and of things, during the late disorders, that a parliamentary sanction was necessary to confirm some of the plainest propositions in the common law.

The law underwent some alteration in favour of a particular description of wards. It was enacted, that when land holden in socage was in the custody of the heir's relations during his minority, the guardian should make no waste, sale, or destruction of the inheritance, but safely keep it for the use of the heir; and, when

<sup>1</sup> Ch. 6.<sup>2</sup> No damages were recoverable in an assize of mortdancestor at common law. *Vide ante*, vol. I. 366.<sup>3</sup> Ch. 16.



he came of age, should answer to him for the issues, by a lawful accompt, with an allowance to the guardian of his reasonable costs. Such guardians were not to sell the marriage of the heir, except for the emolument of the heir himself;<sup>1</sup> so that the privilege of guardians in socage, which heretofore had been the same as that of guardians in chivalry,<sup>2</sup> ceased to be a source of emolument. But the great lords who composed the legislature had no inclination to make the same provision in case of ward and marriage in military tenure.

Some provision was made for the better ordering of services. As to suit of court, owing to great lords and others, it was ordained that no person infeoffed by charter need do more than the charter bound him to; excepting such suit as any one or his ancestors had been accustomed to perform before the king's first voyage into Brittany, which was thirty-nine years and a half before the statute of Marlbridge.<sup>3</sup> As to those who were infeoffed without charter, from the time of the Conquest, or some other ancient feoffment, they were not to be distrained to do such suits, unless they or their ancestors had performed them before the above period of limitation. Further, persons infeoffed by charter to do a certain service, as to pay so many shillings in the year to be acquitted of all services, were not to be bound to any other suits or service *contra formam feoffamenti*, contrary to the terms of their feoffment. It enacts (as had before been directed where such cases happened in Ireland),<sup>4</sup> that where an inheritance descended to parceners, the eldest should do the service, and the others be contributory to her according to their portions. Where there were several feoffees of land for which only one suit was due, the lord was not to exact more than that one suit; and if the feoffees had no warrantor or mesne to acquit them, then every one of them, according to his portion, was to be contributory towards doing the service.

Thus far did this act make order for apportioning suits and services. It goes on to furnish a course of redress for those who were injured contrary thereto. It ordains,<sup>5</sup> that should lords distrain their tenants for such suits contrary to this act, then, at the complaint of their tenants, they were to be attached to appear in the king's court, at a short day, to make answer thereto. Upon this clause a writ was afterwards framed, called, from the design of it, *contra formam feoffamenti*. This writ, as it is not mentioned by Bracton, who is very particular on the subject of services, probably did not exist at common law, notwithstanding a supposed case in Fitzherbert;<sup>6</sup> besides, the writ bears an internal mark of its origin, by always reciting this statute. The remedy in such

<sup>1</sup> Ch. 17.

<sup>2</sup> *Vide ante*, vol. i. 283.

<sup>3</sup> In the fourteenth year of the king, before the disorders of his reign had given opportunity for the invasion of every species of property. We have before seen, that this period had been fixed for the limitation in a writ of nuisance, and also in an assise of novel disseisin; though, in the latter instance at least, in direct violation of the Stat. Mert. *Vide ante*, vol. i. 344, 325, 264.

<sup>4</sup> Ch. 9.

<sup>5</sup> Arow. 243. 16 Hen. III.

<sup>6</sup> *Vide ante*, vol. i. 259.

cases before was of a less concise nature than what was now proposed; for now, besides the process of attachment, the lord was to have but one *essoyn*, if he was within the realm; and the beasts taken on the occasion were to be immediately delivered to the complainant, and so remain till the question between them was determined. If the lord did not appear upon the attachment, nor keep the day given by the *essoyn*, another writ went; and if that was not obeyed, then he was to be distrained by everything he had within the county, and the sheriff was to answer to the king for the issues thereof;<sup>1</sup> he was also to have his body at a certain day. If the lord came not at that day, the complainant was to go *sine die*, and the beasts and other distresses taken were to remain with him, until the lord recovered the services by judgment of the king's court; in the meantime, all further distresses for the same services were to cease, though the lord was yet to be at liberty to sue for them in form of law. If the lord came in, and upon answer was convicted, the complainant was to recover the damages he had sustained by the distress (a).

While this redress was provided for the tenant, the following was contrived for the lord. If tenants withdrew from their lords such suits as they had continued to perform before the above period of limitation, then the lord of the court to which suit was owing was to recover it with damages, by the same speedy justice as to the limiting of days, and the awarding of distresses, as was above provided for tenants. It was enacted also, that lords should not recover seisin of such suits against their tenants by default, as was the old course at common law.<sup>2</sup>

Many provisions had been made in the former part of this statute concerning distresses. It complains that, during the late troubles, great men and others refusing to abide the order of the king's courts, and the due course of the law, took upon them to be their own judges in their own causes, and revenged themselves of their neighbours by taking distresses, till they had fines and ransoms paid at their pleasure. Others, again, would not be justified—that is, submit to the king's officers, nor suffer them to make delivery of such distresses as they had taken of their own authority, though without any pretence of right to justify them. To remedy these disorders, it was now enacted and enjoined that they should not be any longer endured; and, further, that any person taking

(a) In the commentary upon this statute in the *Mirror*, it is said: "Some points in this statute are reprobable—viz., the first five points, because every personal trespass is punishable by a *corporal* punishment, if the trespass be not compounded for by ransom, according to the quality thereof" (*Mirror*, c. v. s. 3). That is, that there ought to be fine or imprisonment, and not mere damages. "The chapter which commands the Great Charter to be kept is defective for want of addition of punishment. The chapters remedial as to lords of fees is reprobable for mitigation of punishment, for all who so defraud the law are punishable by corporal punishment, and not by mere amercement"—i.e., in damages (*Ibid.*)

<sup>1</sup> That is, the process was to be an attachment, and then another attachment *per miliores plegios*, and then the last distress. *Vide ante*, 58, 59, and vol. i. 480.

<sup>2</sup> Ch. 6.

revenge, without a judgment of the king's court, should be punished by a fine according to the offence;<sup>1</sup> in the same manner of a distress made without authority (*a*). Besides such fine, amends were to be made to them who had sustained any damage by the distress.<sup>2</sup> Moreover, it was declared, that none should distrain any person to come to his court, who was not within his fee, or within his hundred or bailiwick; nor was any to take distresses out of his fee or place where he had a bailiwick or jurisdiction; all which, like the provisions of the former act, were nothing more than declarations of the law as it stood before; only in this, as in the former case, it was ordained, that persons offending against this act should be punished in damages and fine, as above mentioned, according to the nature of the fact.<sup>3</sup> Again, if any would not permit such distresses as he had taken to be delivered by the king's officers, according to the law and custom of the realm, or would not suffer process of summons, attachment, or execution of judgments of the king's courts to be done according to law, he was to be punished in the

(*a*) The practice here denounced was that of taking revenges for injuries in other instances than those allowed by law. The "revenge" meant taking cattle or goods as a distress, to enforce a demand which ought to be enforced at law, not taking cattle as a distress for doing damage, distress "*damage feasant*," which was allowed by law. Hence several passages in the Saxon laws which prohibit taking distresses until the right has been claimed at law, and default has been committed by defendant, supply the best possible commentary upon the ancient statute of Marlbridge. The terms of the statute are—"Et nullus de cetero ultiones aut *distractiones*, faciat per voluntatem suam absque consideratione curie domini regis, si forte dampnum vel injuria sibi fiat unde emendas habere voluerit de aliquo vicino suo sive majore sive minore." Here it will be seen that "revenges" and "distresses" are spoken of as identical, upon which Lord Coke observes in his comments on the law:—"Ultiones: that they, refusing the course of the king's laws, took upon them to be their own judges in their own causes, and to take such revenges as they thought fit, until they had ransom at their pleasure. "*Distractiones*:" that is, *taking distresses*, not according to law; as for rent services, or for damage feasant, or for other lawful cause; but for revenge, without cause, of his own head and will—that is, to be his own judge and lawyer—to satisfy himself without any lawful means or course of law" (2 *Institutes*, p. 303). Here it will be seen that Lord Coke recognises the right of distress for rent, and for *damage feasant* on the land of the party distraining. The statute itself recites that the great men refused to be bound by process of law, and took upon themselves to be judges in their own causes, and to take such revenges or distresses as they thought fit, until they had ransom at their pleasure; and it enacted that no person should take revenges or distresses of his own will without legal process (2 *Inst.* 103). Thus it also provided (*a*. 15), that no subject should *distrain out of his own land* (2 *Inst.* 131). It is clear, therefore, that the mischief was that men took distresses, not where allowed by law, as for rent or *damage feasant* (in both which cases it would be on their own land), but off their land, to enforce real or pretended claims for redress for injuries or payment of debts; and it is thus beyond a doubt, which is declared illegal, as undoubtedly it always has been by the law of this country. Distraining of goods was indeed allowed at common law, as part of the process of the courts, to enforce appearance in a suit; and in that way it was under the authority of the law, and the object was to prevent its being done *without* such authority. Such a distress was afterwards called *distringas*.

<sup>1</sup> Lord Kaime is certainly mistaken, when he relies upon this provision of the Stat. Marl. to show that it was a practice warranted by our old law to force payment of a debt by taking, at short hand, a pledge from the debtor. The distresses here meant are mentioned by the act as *breaches* of the law, and do not correspond with *poinding* in the Scotch Law. Kaime's Law Tracts, 153. Ersk. b. 3, tit. 6, sec. 2.

Oh. 1.

<sup>2</sup> Ch. 2.

above-mentioned way, as one who would not be justified by the law of the land.

The former chapters of this statute inflicted punishment where the distress was unlawful, or the person distraining had no seignory, or jurisdiction at all, or distrained out of his fee or jurisdiction. The following provision was made respecting distresses that were lawful. It directs, that where a lord distrained his tenants for services and customs due to him, or for anything which gave the lord of the fee a right to distrain, and it was afterwards found that the services were not in arrear, the lord should not be punished by fine, as in the above cases, if he suffered the distress to be immediately delivered according to the course of law; but should be amerced only in such manner as had hitherto been used, and the tenant should recover his damages against him.<sup>1</sup> The general construction of this chapter has been, that an action of trespass was hereby taken away in such cases;<sup>2</sup> though, from the bare words of the act, there seems to have been no such design in the legislature, but merely to exempt distresses of this kind from any conclusion which might possibly be drawn from the former provisions respecting distresses that were wholly unlawful.

It was declared and enacted, that no one should drive a distress out of the county where it was taken; and if one neighbour did so to another, of his own will, and without any lawful right, he was to be punished by fine, as for an offence *contra pacem*. Nevertheless, if a lord did so towards his tenant, he was to be proceeded against in another way, and only amerced heavily. It was declared, that distresses should be reasonable; and that those who took unreasonable and improper distresses, should be heavily amerced for the excessiveness thereof.<sup>3</sup>

As the king had, by his prerogative, a right to distrain for rent in any of his tenants' lands, though they were out of his fee and seignory, several lords had taken upon themselves to do the like; but it was now enacted, that no man should, for any cause whatsoever, take a distress out of his fee, or in the king's highway, or in the common street, except only the king, or his officers having a special authority for so doing.<sup>4</sup>

The only remedy in case of distress was a writ of replevin, the manner of proceeding in which is still fresh in the reader's memory.<sup>5</sup> Some time was required before a replevin could bring relief to the owner of the goods or beasts; and this delay was greatly increased when the distress was impounded within a liberty that had return of writs; for the sheriff could not, in general, act within such franchise in person, but was to make a warrant to the bailiff thereof, ordering him to make deliverance.<sup>6</sup> To remedy such inconveniences as might arise from these exclusive jurisdictions, it was provided by another chapter of this statute, that where

<sup>1</sup> Ch. 3.<sup>2</sup> 2 Inst. 106.<sup>3</sup> Ch. 4.<sup>4</sup> Ch. 15.<sup>5</sup> *Vide ante*, 46.<sup>6</sup> *Ibid.* 48, in what manner Bracton states the authority of the sheriff in this particular.

the beasts of any man were taken, and wrongfully withheld, the sheriff, upon complaint made to him, might deliver them without any impediment or contradiction of the taker, if they were taken out of a liberty; and if taken *within* one, and the bailiff thereof refused to deliver them, then the sheriff, upon their default, might himself make a deliverance of them.<sup>1</sup> Thus was the sheriff confirmed in his<sup>2</sup> power to make replevin without a writ; and, either by parole or by precept, either in or out of the county court, he might now command his bailiff to deliver the distress; a very great improvement in the proceeding by replevin.

Another abuse of the summary process by distress, was endeavoured to be removed by chap. 22 of this statute,<sup>3</sup> which ordains, that none should distrain his freeholders to answer for their freeholds, nor for anything touching their freeholds, without the king's writ; nor should any cause his freeholders to swear against their wills; because, says the act, no man has any authority to do that, but by the king's command. It should seem, that, before this, lords would by distress compel their tenants to discover their title-deeds, and show by what services they held, and so lay them open to litigations and contest: a proceeding more harsh and unpopular than even that by *quo warranto* or *quo jure*, which was calculated to attain the same object, and was, unfortunately, justified by law.<sup>4</sup> The swearing here is supposed to mean the discharge of their duty in the court baron and hundred court, where the freeholders were *sectatores* and judges, and were sometimes forced, by oppressive distresses, to give their verdict *on oath* between party and party, according to the pleasure of the lord.<sup>5</sup>

The remaining part of this statute relates to the general administration of justice, either civil or criminal. We shall first consider what concerns the former. Of this, the first is the chapter upon *beaupleader*. It seems, that bailiffs and judges of inferior courts had followed the example, set by kings of England, of selling justice, and used to take fines of suitors for a fair or perhaps favourable hearing of their cause; which fair hearing was called *pulchrè placitare*, or *beaupleader*. It was ordained, that neither in the itinera of the justices, nor in the counties, hundreds, nor courts baron, should any fines be taken *pro pulchrè placitando, nec per sic quòd non occasionentur*.<sup>6</sup> That this is the meaning of *beaupleader*, and not that it was a fine for amending a wrong plea,<sup>7</sup> seems probable from a passage in the *statutum Wallie*, and from the manner in which the author of *Fleta* speaks of this fine: *Nititur*, says he, *dominus vel ejus senescallus ipsos OCCASIONARE, arguendo, et redarguendo, donec finem fecerint pro pulchrè placitando*.<sup>8</sup> The statute says, *Viccomes verò, in veredictis, et recognitionibus admittendis, non quarat OCCASIONES versus præsentantes, nec capiat ab eis fines*

<sup>1</sup> Ch. 31.<sup>2</sup> *Vide ante*, vol. i. 426.<sup>3</sup> 2 Inst. 122, 123.<sup>4</sup> *Vide ante*, 48.<sup>5</sup> 2 Inst. 142.<sup>6</sup> *Flet.* 147.<sup>7</sup> Ch. 22.<sup>8</sup> Ch. 11.

*per sic quod non OCCASIONENTUR*<sup>1</sup>; which, at least, has no reference to pleading. Upon this statute a writ was framed to relieve those who were distrained for any fines of this kind.<sup>2</sup>

In furtherance of proceedings in court, it was provided, that charters of exemption and liberties, granting that certain persons should not be impanelled in assizes, juries, or recognitions, should not operate as an impediment to justice; but that, where right could not be done without them, as in the great assize, in perambulations, and in charters and deeds of covenant where they were witnesses, and in the like cases, they should submit to be sworn; saving, however, their franchise in all other cases.<sup>3</sup>

When a court baron had given a false judgment, it seems, the regular order of appeal was to the court baron of the lord next above, and so upwards to the chief lords; but if the next immediate mesne lord had no court, the judgment could not be redressed in the court of the next superior, for want of privity, and recourse was to be had to the bench, or the justices in eyre.<sup>4</sup> This series of appeal occasioned great delay and expense: to prevent which it was provided, that none, except the king only, should hold pleas of false judgment given in the court of his tenants; for such pleas, says the statute, *specialiter spectant ad coronam et dignitatem domini regis*.<sup>5</sup> False judgments were thenceforward to be heard in the common pleas and the eyre. A great inducement to the king for depriving inferior courts of this subject of jurisdiction, and bringing it immediately into his own court, was, that the fines to be imposed for false judgments were thereby brought under the immediate cognizance and direction of the king's justices (*a*).

The power of amercing for defaults was exercised by all persons authorised to make judicial inquiry; and this power was exercised in a manner not wholly satisfactory. An act, to the following effect, was therefore made to redress this. It was ordained, that no escheator, or inquirer (which is said to signify sheriffs, coroners

(a) Attention has already been drawn to the important influence of this matter of fines, or fees, or amercements, and other pecuniary impositions or penalties upon the administration of justice. It has been seen that there is every reason to believe that the interest the Norman sovereigns took in the administration of justice arose entirely from their finding that it could be made a source of revenue, and that the attention they paid to it was directed almost altogether to that object. There is, it has been shown, every reason to believe that the sending of justices itinerant into the counties, and the institution of a regular judicature—the establishment of superior courts—were all dictated by this motive; and that to the same motive may be ascribed the various devices invented and resorted to in order to discourage litigation in the local courts, to remove it into the superior courts, and to convert them into courts of ordinary and primary jurisdiction. The steps by which this was accomplished have been, in some degree, traced and described in the Introduction, where, however, attention was not fully called to the various modes adopted for encouraging removal of causes from inferior courts, and the various means provided for the purpose. The effect happily was, in the result, to improve the administration of justice, at a period when nothing could effect an improvement except a regular judicature.

<sup>1</sup> Stat. Wall. 12 Ed. I.

<sup>2</sup> 2 Inst. 138.

<sup>3</sup> Flet. 147.

<sup>4</sup> Ch. 20.

<sup>5</sup> Ch. 14.



*super visum corporis*, and all those who received power to inquire in special cases)<sup>1</sup>, or justice assigned specially to take certain assizes, or to hear and determine certain complaints, should any longer have authority to amerce for default on the common summons; and, in short, none but the *capitales justitiani in itineribus suis*.<sup>2</sup>

Among the alterations made for the improvement of judicial proceedings, that which concerned the writ of entry was of great importance (a). We have seen, that this new remedy was confined to certain degrees, which gave a denomination to the different writs, some of which were thence said to be in the *per*, and others in the *per* and *cui*.<sup>3</sup> This was a check upon the application of the writ of entry, which, in other respects, was of a general import, and capable of being further extended. With a view to this, it was ordained, that if those alienations upon which a writ of entry used to be had, were so many degrees removed, as not to be properly within it, the complainant should have a writ to recover his seisin, without mention of the degrees, into whatsoever hands the land should have come by such alienation: and this, says the statute, shall be *per brevia originalia per concilium domini regis providenda*.<sup>4</sup> In pursuance of this permission, a new writ was formed, called a *writ of entry in the post*, because, instead of specifying the particular steps by which the alienation had happened, it said generally, that *post* such alienation, &c. This new writ, from its indefinite nature, was applicable to almost every possible case of ouster of freehold, and tended to make the writ of entry a still more general remedy.

There were two defects in the law, as some thought, respecting the property of abbots, priors, and other religious persons and societies, which it was now endeavoured to remove: first, if the goods of a monastery were taken away in the time of a predecessor, it was an opinion, that, after his death, the successor had no remedy for the trespass: the other defect was, that, if in the time of a vacancy, when there was no abbot or prior (or whoever might be the head), any intrusion were made, the successor had no remedy to recover the land with damages, though the predecessor died seised thereof: both these were now remedied.<sup>5</sup>

(a) "It is to be observed, that the common law provided for the quietness of men's freehold and inheritance, and that they should not be disturbed" (i.e., in their possession) "insomuch as he that had right could not enter upon him that came in by descent or lawful conveyance, but was driven to his writs of entry" (i.e., to his suits at law), "and the common law, for the safety of men's possessions, further provided that, if the land were conveyed out of certain degrees—the demandant was driven to his writ of right (a long and final remedy) to the end that suits might have an end; and that he who had right should take his remedy by writ of entry before there were above two descents or conveyances, and also within the time of prescription" (2 *Inst.* 153). This was distinguished from the assize of novel disseisin, which was, as Lord Coke says, "*festinum remedium*, and much favoured in law for the relief of the disseisees in regaining possession of his stock of cattle and goods" (2 *Inst.* 236).

<sup>1</sup> 2 *Inst.* 136.  
<sup>2</sup> Ch. 29.

<sup>3</sup> Ch. 18.  
<sup>4</sup> Ch. 28.

<sup>5</sup> *Vide ante*, vol. i. 121, 393.  
2 *Inst.* 151.

Several provisions were made for improving the process of law. By one act it was provided, that if bailiffs, who ought to account with their lords, withdrew themselves, and had no lands or tenements by which they might be distrained, they should be attached by their bodies, so as the sheriff might cause them to come to render an account.<sup>1</sup> Thus was a process against the person framed upon this statute, beginning with *Monstravit nobis A. quod cum B. ballivus suus, &c.*<sup>2</sup> of which, and the action of account, more will be said in the next reign. While this care was taken for securing the regular accounting of bailiffs, the interest of the lord was again consulted by another provision, that restrained farmers from making waste. It is the opinion of some,<sup>3</sup> though not, as it should seem, well founded,<sup>4</sup> that there was no remedy at common law for waste, except against a tenant by courtesy, in dower, and a guardian (a). These being, say they, estates created by operation of law, the law likewise provided that they should not be abused; but such in-

(a) This is very important, as the first statutory enactment of the process of arrest for debt, or mere civil demands. At common law, arrest, it should seem, was only allowed in cases of trespass with force; which was deemed an offence against the king, although venial, and admitting of satisfaction to the party along with a fine to the king. It is said, indeed, in the *Mirror*, in treating of personal actions, that the defendants were distrained or attached to the value of the demand; and for default, after default, judgment was given for the plaintiff, but that this usage was changed in the time of Henry I. (query Henry III.), so that no freeman was to be distrained (or attached) by his body for a personal action venial, so long as he had lands, as to which the judgment by default was in force till the time of Henry III., that the plaintiff should hold the land until due satisfaction was made (c. iv. s. 5). It is further said, that in personal actions venial, where the defendants had not freehold land, the process was first awarded to arrest their bodies, and then they were outlawed (c. vi.). But this, it is to be presumed, meant cases of trespass, as it would not be consistent with what had already been said, and there is no doubt that at common law the first process was summary, then distress or attachment of goods. This is what had been previously alluded to in the clauses as to distress, or rather *distringas*, to compel satisfaction for alleged injuries, no one having a right to levy such distresses, except on *his own land*, for rent or *damage feasant*. Thus it is said in a subsequent section of the *Mirror*, that where the king commands the sheriff (as in an original writ) that he command such a one to appear, and if he do not, then that he summon or attach the defendant; in which case, if the sheriff had not warned the tenant to appear, he would not take surety, &c. (s. 9). Elsewhere it is said that personal actions are commenced by attachments of the body real by summons, and mixed actions first by summons and afterwards by attachment (c. iii. s. 6); but the context shows that the action is treating of trespasses, false imprisonments, &c.; and mixed actions are defined to include contracts and distresses, &c., and that they are called "mixed" by reason of the mixture of process. So that it is clear that "personal actions," in the *Mirror*, means actions for trespasses to the person, and that in all others the first process was summary, and attachment even of the goods was not allowed until after default upon summons; and arrest of the person was not allowed where the defendant had immovable property like land, the principle obviously being that arrest (before judgment) was only for security, and that if a man had land, which could not be removed, and the seizure of which would be an ample security, he should not be arrested, except for an offence against the king, committed with personal violence. But then this principle did not apply when the parties had no lands, and withdrew themselves with their personal goods, so that there would be no security without their arrest, and hence the present enactment, limited in the first instance to actions of account, but afterwards extended to all other personal actions, or rather actions as to personality. As to actions for recovery of realty, the old principle still applied.

<sup>1</sup> Ch. 23.<sup>2</sup> Fleta.<sup>3</sup> 2 Inst. 299.<sup>4</sup> Vide ante, vol. i., 336.



terests as were conferred by agreement between man and man, were left wholly to the terms of such agreements; and if there was no provision made therein by the parties themselves, the law would make none for them. But the common law was otherwise; and it was now enacted, in confirmation thereof, that farmers (which signified as well those for life as for years), during their terms, should not make waste, or exile of woods, houses, or men, nor of anything belonging to their farm, unless they had a special licence or covenant for so doing; and if they did, and were convicted thereof, they should refund full damages, and be heavily punished by amercement.<sup>1</sup>

The other parliamentary regulations about process were as follow: Chap. 7, speaks of the *common writ de custodia*; of which there appears no mention in Glanville nor Bracton. It should seem, however, that this meant the *writ of right of ward*. The process in this, as in most other personal actions, was summons, attachment, and distress. This was thought not sufficiently compulsory, where the possession of the ward was, probably, of more value than all the lands and goods which were taken by the distress. A new course was therefore devised; and it was enacted, if the deforcors came not at the great distress,<sup>2</sup> then the same process should be repeated twice or thrice, within the next six months, and be read openly in the county court: and that proclamation should be made for him to appear at a day limited; and if he came not at the end of half a year, according to the proclamation, he was to lose the seisin of the ward, as a rebel, and one who would not abide the judgment of the law. If a custody was demanded against one who held it by reason of ward, the process ordained by this statute was not to lie; but that proceeding was left to the course of the common law.<sup>3</sup>

The process in several actions was altered in the following way: Not satisfied with the special exception already made from the *dies communes*, in favour of process in dower *unde nihil* (a),<sup>4</sup> the parliament now declared in a general way, that *dentur quatuor dies per annum ad minus*, and more if conveniently could be, so that they

(a) This is worth notice as the earliest enactment of judgment for default of appearance. Lord Coke, in his reading upon this statute says:—"Put the case then upon the summons, the defendant is returned *nihil*; and at the attachment for distress *nihil* also. This case is out of the letter of the statute, because the defendant was never summoned; but it is said, that when there be two mischiefs at the common law, and the lesser is provided for by express words, the greater shall be included within the same remedy. And this case, where *nihil* is returned, is the greater mischief; for he (the defendant) by his default shall lose nothing; but in the case provided, the defendant by his default shall lose issues; and the law intends that he will rather appear than lose issues" (3 *Inst.* i. 24). This is worth notice, as the earliest illustration of the liberal construction put upon remedial statutes.

<sup>1</sup> Ch. 23. This latter clause, about waste, is made a separate chapter in 2 *Inst.*, and is numbered as the twenty-fourth chapter; which makes this statute contain thirty chapters in that author, though in the common editions it has only twenty-nine.

<sup>2</sup> By the great distress is meant the last and most compulsory of the four processes of *distringas*.

<sup>3</sup> Ch. 7.

<sup>4</sup> *Vide ante*, 60.

should have five or six in the year at least.<sup>1</sup> In assizes *ultimæ presentationis*, and suits of *quare impedit*, of churches vacant, days were to be given from fifteen to fifteen days, or from three weeks to three weeks, as the place happened to be near or remote; and in a *quare impedit*, if the disturber appeared not at the first day of summons, nor cast an essoin, he was to be attached; and if he did not appear to that, he was to be distrained by the great distress. If he still made default, a writ was to go to the bishop of the place to prevent the lapse (a). This shortening of the process in *quare impedit*, was only confirming a practice<sup>2</sup> established (though as Bracton says without sanction of the law) by the courts upon their own authority. It was further enacted, in all cases of attachment, that the second attachment should be *per melioris plegios*, and then should follow immediately the last distress:<sup>3</sup> a regulation which the first check upon the *solemnitas attachmentum*<sup>4</sup> and the four processes of *distringas*.

In order to save some of the grievous delay occasioned by essoins, it was enacted, that after any one had put himself upon an inquest, no party should have more than one essoin, and one default.<sup>5</sup> As no inquest could be taken by default in a real action, this provision has been held to relate to personal actions only.<sup>6</sup> Again, no one was to be obliged to swear, as had been the practice, to warrant the truth of an essoin:<sup>7</sup> though the statute speaks generally of essoins, this provision has been held to apply only to the common essoin *de malo veniendi*, so that the practice of swearing the warrant of other essoins still continued.<sup>8</sup> Warrantors in pleas of land were exempted from a fine for non-appearance at the summons of justices in eyre, but were to be further warned to appear.<sup>9</sup>

The last provision on the subject of process was to give effect to a regulation made by the statute of Merton about re-disseisins. It had been directed by that act,<sup>10</sup> that a person guilty of re-disseisin should be committed to prison, till he was delivered by the king,

(a) This is remarkable as the first known enactment in our law of a power to give judgment by default, though there is some obscure intimation in the *Mirror* of a practice in personal actions to allow judgment by default; and it should seem that in this action of *quare impedit*, for the particular reason assigned—to prevent a lapse,—such a practice had arisen. In the *Mirror* it is said that in real actions the practice in case of default was to seize the defendant's land, to the value of the demand, to be adjudged to the plaintiff to hold as a distress; “but this was only to enforce appearance, and so as to mixed actions, the defendants were distrainable by all their movable goods, until they appeared and answered” (c. iv., s. 7, 8). As to personal actions, it was said that the defendants were distrained to the value of the demands, and for default after default judgment was given for the plaintiff. This, however, it should seem, was only as a distress; for it is added, that the body was not to be seized so long as the defendant had lands, as to which the judgment by default was of force till the reign of Henry III., that the plaintiff should hold the land until *due satisfaction made* (c. iv. s. 5). It was not until ages afterwards that final judgment by default was allowed, except in *quare impedit*.

<sup>1</sup> Under the former statute the returns were about five in a year. The common returns in the statute of *dies communes* are not more than two in a year.

<sup>2</sup> *Vide ante*, vol. i. 355, 356.

<sup>3</sup> Ch. 12.

<sup>4</sup> *Vide ante*, vol. i. 482, 483.

<sup>5</sup> Ch. 13.

<sup>6</sup> 2 Inst. 126.

<sup>7</sup> Ch. 19.

<sup>8</sup> 2 Inst. 127.

<sup>9</sup> Ch. 26.

<sup>10</sup> Namely, c. 3. *Vide ante*, vol. i. 264.

*vel aliquo alio modo.* Under these last words, such persons used to be delivered by the common writ *de homine replegiando*.<sup>1</sup> To prevent this in future, it was now ordained, that they should not be delivered *sine speciali precepto domini regis*, and that they should also make fine with the king for the trespass. If the sheriff delivered them any otherwise, he was to be grievously amerced; and the person so delivered was to make fine for the trespass.<sup>2</sup> Thus far of the provisions of this statute relating to civil matters.

Some few alterations were made in our criminal law by this statute. The splendid appearance of the sheriff's tourn was wholly diminished by a law, which ordained that archbishops, bishops, abbots, priors, earls, barons, or any religious man or woman, should not be obliged to attend there, unless they had some special business; but the tourn in other respects was to be held as formerly, in the time of *Magna Charta*, and of the reigns of king Richard and king John. Those who had tenements in different hundreds were not to be obliged to attend the tourn, except only in the district where they were most conversant.<sup>3</sup> The attendance before the sheriffs and coroners was virtually dispensed with in another instance. It was declared, that the justices in eyre, in their circuits, should not, in future, amerce townships, because all such as were twelve years of age came not before the sheriffs and coroners to make inquiry of robberies, burnings, and other things appertaining to the king's crown, provided there were sufficient others of the townships to make inquisition. However, it was still required, that in inquisitions for the death of a man, all persons twelve years old should appear, unless they had a reasonable excuse for their absence.<sup>4</sup>

A provision was made on the subject of *murder*, which has created some difficulty among modern lawyers. *Murdrum*, says the statute, *de cetero non adjudicetur coram justitiariis, ubi infortunium tantummodo adjudicatum est; sed locum habeat murdrum in intersectis per feloniam, et non aliter*.<sup>5</sup> The fine called *murder*, which has been so often mentioned, though by the general law only due upon a secret felonious killing, yet, as appears from Bracton,<sup>6</sup> was by the particular custom of some places exacted in other cases of homicide, and even in such as were not felonious. The object of this statute, therefore, was to abrogate such customs, and reduce the whole law of the realm to a uniformity. This is very different from the opinion of those who imagined the *murder* here spoken of to signify the fact of killing; and that the statute ordained, that killing *per infortunium* should not be deemed felonious, or murder.

The other regulation concerning matters of crime was this: that where a clerk was arrested for an offence, and was afterwards by the king's command let to bail, or replevied, with a condition, that they to whom he was let to bail, should have him before the

<sup>1</sup> 2 Inst. 115.

<sup>4</sup> Ch. 24. *Vide ante*, vol. i. 263.

<sup>2</sup> Ch. 8.

<sup>5</sup> Ch. 25.

<sup>3</sup> Ch. 10.

<sup>6</sup> *Vide ante*, 22.

justices; such sureties and such bail, if they had his body before the justices, were not to be amerced, though he refused to answer, and claimed his privilege of clergy: <sup>1</sup> a provision which seems dictated by such plain and obvious justice, that one may wonder how it ever should be thought necessary to be secured by statute.

These were the alterations and confirmations of the common law made by the statute of Marlbridge, 52 Hen. III. to which may be added a chapter, whose substance was frequently repeated in the following reigns. This required, that *Magna Charta* should be observed in all its articles, as well those relating to the king, as to others (a); and it was directed, that this should be inquired of before the justices in eyre in their circuits, and before sheriffs in their counties. Writs were to be granted *gratis* against such as

(a) Upon this, the commentator in the *Mirror* shrewdly observes, "The chapter which commandeth the Great Charter to be kept in all points is defective, for want of provision of punishment, and it seems idle to make constitutions not holden" (*Mirror*, c. v. s. 7). That was written after the statute of Marlbridge, which was in the 52d Henry III., that is more than half a century after *Magna Charta* had been first granted by the king, and a quarter of a century since it had been confirmed by him; and yet the commentator treats it as idle, it had been so little observed! And in the same chapter of the *Mirror* we find a long catalogue of "abuses," most of them in violation of the charter. The great difficulty of the age, however, was in enforcing the law; and that difficulty would not have been met, as the commentator in the *Mirror* appeared to suppose, merely by enacting punishments for breaches of the charter, for still the difficulty would have been in the execution of the law. The difficulty lay in the want of *parity* and the want of *power* in the administration of justice. It was in vain to declare the rights of the subject, and it would have been as vain to enact punishments for their infraction, there being not sufficient honesty or not sufficient strength in the courts of justice to pronounce and enforce judgments which should vindicate and protect these rights. The whole of the reign was occupied in endeavours to effect the object. When the charter was confirmed, the itinerant justices were ordered to summon all knights and freemen to their courts, and to administer to them an oath—that they would keep the peace and observe the good and lawful customs of the realm. But what were oaths in those times of turbulence and violence. Later in the reign the law was, as the Parliament of Oxford insisted, that four knights should be chosen by the freeholders of each county to ascertain and report to parliament the excesses and injuries committed within the county by the ministers of the king and the itinerant justices themselves. But what manner of protection there were may be gathered from the fact, that the chief justiciary, appointed by the barons, surrendered the whole body of the Jews in London to plunder and massacre (*Lingard*, v. 2, c. vi.). There was no real guarantee for liberty and law until the authority of parliament was established (*vide post*). "Volons nos que generale crie soit fait solempnement par les marches, eyres, et burghes, par tout le counte, &c. Et que le viceonte du pays est illoques trestans les brefs que ajournes outre este jusques en eyre, et toutes les amises de novel disceisin de mort d'ancester, et de dower, etc. Et mandrouns a nos justices de banks, que trestans les pleas del counte adjournent et enneyent devant nous ou devant ceux justices errantre en cet counte, essint que ils soient a certain jour. Et quant a la venue de nos justices volons nos que comme ils serront venues la ou il deyrent cyrer q'ils monstrent, le poer que ils averount de nous par nos lettres patentes et en audience del people les facent lire, et puis celui que prima serra nos ne en celes lettres, nostre et die al people les enchesous et les profite de leur venue en cel counte" (*Britton*, c. ii.). "Au commencement soient enques, oyer et terminer les veus articles et chapitres presentes en le darreyn eyre eis cel counte, &c." (c. iii.) Now, these extracts from Britton have been given with the object of explaining that justices in eyre were justices itinerant of a larger jurisdiction than ordinary justices itinerant, coming with a larger commission, to hear and determine all matters, civil or criminal, apparently without any limitation; whereas the justices

offended therein, returnable *coram rege, coram justitiariis in banco*, and before the justices itinerant; the like of the Charter of the Forest: all offenders of this kind were to be grievously punished.<sup>1</sup>

In the meantime the legislature of the national clergy were employed in framing regulations, that were considered as binding to a certain degree, like those of the parliament. Several synods were holden during this reign; some by archbishops, and some by the pope's legates. The former were *provincial*, the latter *national* councils; the *constitutions* made in the former are accordingly called *provincial*; but those in the latter, *legatine*. Of the canons and constitutions made in these assemblies, many have come down to our times. These form a kind of national canon law; and as such, were better received than the pontifical law, which had been introduced into the kingdom in the reigns of Henry II. and John (a). From the parliamentary appearance of those assemblies, their laws carried in them some similitude to acts made by the legislature of the kingdom. The subjecting the church and clergy to such an authority seemed reasonable, consistent, and safe. Among the legatine constitutions of this reign, the most distinguished are those of Cardinal *Otto*, made in a council held in 1220; and those of Cardinal *Ottoboni*, in one held in 1268 (b).

Itinerant appear, as has been already seen, to have had only a jurisdiction over pleas of the crown, with a limited jurisdiction in smaller civil matters. Both Britton and the *Mirror* were of the reign of Edward I., whereas Bracton, upon whom our author founds his account, wrote in the latter part of the present reign; but there is, it will be seen, an entire accord between what is said by Britton as to justices in eyre, and by Bracton as to justices itinerant. These justices by degrees superseded the county courts. In the *Leges Henrici Primi* there is a chapter on the county court which commences thus—“*Judices regis sunt barones comitatus*,” which Spelman considers—no doubt truly—to mean the freeholders of the county. Originally, as seen in the Saxon laws, and as stated by Lord Coke, all who held by military tenure were called “*thanes*” or “*barons*,” those who held of the king being called king's *thanes* or greater barons, the others lesser *thanes* or barons. The system of tenure originally comprised all freeholders, as appears by the *Mirror*, and they were the suitors and judges in the county courts.

(a) It has already been seen what an exaggerated and incorrect idea our author had of these pontifical laws, which were simply the same as the old Saxon laws of the country. And it may be conceived how little likely it was that constitutions and canons, enacted under papal legates, would be one whit less papal than the papal constitutions themselves. Yet, such is the force of traditional prejudice, that because it had become a national habit to feel and express dislike to anything papal, the very same constitutions which were denounced by the author in a former chapter as papal, are here represented, rightly enough, as being the most natural things in the world, in a Roman Catholic country with a Roman Catholic Church.

(b) Dr Lingard says that many of the canons which Cardinal Ottoboné published, relating to commendaries, residence, delapidations, repairs, and the plurality of benefices, still retain the force of law in the ecclesiastical courts. Otho, his predecessor, had vainly attempted to abolish the abuse, which was so prevalent in England, of bestowing a number of benefices on the same person. On the present occasion, some of the prelates appealed from the legate to the Pope, but were induced to withdraw their appeal; and indeed, adds the learned historian, it would not have succeeded. So inexorable was Clement on the subject that, as soon as he learned that his nephew possessed three benefices, he compelled him to resign two (*Lingard's Hist. Eng. v. ii. c. vi.*) From this we see that the national prelates were sometimes in favour of abuses, and that the papal authority was sometimes exercised for their repression. Our author, in another chapter, shows this.

<sup>1</sup> Ch. 5.

These constitutions, whether provincial or legatine, are principally taken up in such matters as peculiarly belonged to the consideration of a national assembly of the clergy. The life and conversation of churchmen; the due administration of spiritual things; whatever related to religion or to manners; such are the objects upon which these clerical ordinances are mostly employed. But among these godly and sober regulations, there are certain constitutions of a famous prelate that breathe nothing but the spirit of clerical ambition. These are the constitutions of Boniface, archbishop of Canterbury. This determined successor of Becket had set on foot all the claims so steadily urged by that famous martyr in the cause of the church; and resolved, by a legislative act of the convocation, at once to establish them for law, at least as far as they could be established by the sanction of an ecclesiastical synod.

By the authority of a convocation held A.D. 1261, he ordained, that if any archbishop, bishop, or other inferior prelate, should be called by the king's letters before a secular judicature, to answer respecting matters that were known to concern merely their office and court ecclesiastical; as, whether they had admitted, or not admitted clerks to vacant churches; whether they instituted, or did not institute rectors; whether they had passed excommunication or interdiction; whether they had consecrated churches, celebrated orders, taken cognizance of causes purely spiritual, as tithes, oblations, bounds of parishes, and the like (which, says the constitution, cannot concern the secular court) (*a*); whether they had

(*a*) This certainly was otherwise, according to the view of the English law as it was then settled and understood, and it has already been shown that, according to the principles of the canon law itself, the ecclesiastical law could only interfere with the secular courts in matters within their province, upon the ground of a recognition of the ecclesiastical power by the law of the land. So that, even upon canonical principles, the right of the church to interfere with such matters would depend upon the degree in which her power was recognised by the law. Now, as to this, the result of the struggle which had taken place in the reign of Henry II. had been undoubtedly to work some alteration in the law, and to settle it upon a basis far less favourable to ecclesiastical power than as it had been before understood. As already observed, in commenting on the Constitutions of Clarendon, although they were not *per se* of statutory authority, and the degree to which they were law would depend upon the extent to which they had been afterwards incorporated with the law by actual use and adoption, they had certainly to a large extent been so used and adopted, and had greatly altered the law. For instance, in the treatise of Glanville, written at the close of the reign of Henry II., it is (as already stated) laid down as clear law that the right of advowson or presentation was of secular cognizance, and that prohibition would go to the ecclesiastical court if it took cognizance thereof (*Glanv. lib. v. c. viii., ix.*), although if a question arose between clerk and patron, or between two clerks—as to institution, not presentation—it should be decided in the ecclesiastical court (*Ibid. c. viii., ix.*) The principle involved is this, that wherever temporality was annexed to spirituality, the former should draw the latter into the king's court, and not the latter the former into the ecclesiastical court, was laid down and expounded by Bracton in his great treatise, and applied to various cases. And however illogical this might appear to be upon his own principles, that the principal would draw to it the accessory—unless indeed the law decreed the temporality to be the principal and not the spirituality, to which it was annexed—such was certainly the law as laid down in his treatise, composed and written towards the end of this reign. And as even, according to the ecclesiastical law, this question depends upon the degree to which the law of the land allows of or recognises the power of the church, it may



taken cognizance of sins, or excesses, as perjury, *fidei læsio*, or breach of faith, sacrilege, violation or perturbation of ecclesiastical

be proper here to present the passages in Bracton in which he lays down the principle on which it depends :—"Est etiam jurisdictio quæ pertinet ad forum ecclesiasticum, est etiam alia jurisdictio quæ pertinet ad coronam, in causis et placitis temporalium in foro seculari, et unde videndum cujus iudicium et forum actor adire debet et verum est quod sive laicum sive clericum venit quis convenire, debet adire iudicem et sequi forum rei et iudicem habebit illum apud quem rem habet domicilium, sive domicilium habuerit sub jurisdictione unius vel duorum. Et licet generaliter verum sit quod actor forum rei sequi debeat, fallit tamen in casibus, propter diversitatem jurisdictionum et causarum de rebus spiritualibus et temporalibus et eorum sequela sicut in causa matrimoniali, et rebus præmissis ob causam matrimonii quæ in foro ecclesiastico debent terminari, quia cujus juris jurisdictionis est principale, ejusdem juris erit accessorem. Et eodem modo sicut si in foro seculari agatur de aliquo quod pertinet ad coronam et fides fuerit ap. posita in contractu non propter hoc pertinebit cognitio super principale ad iudicem ecclesiasticum. Item fallit in causa testamentaria et aliis pluribus causis ecclesiasticis. Item, ratione contractus. Item, ratione rei petiti sit se clericus petat versus clericum vel laicum debitum, quod non sit de testamento vel de matrimonio, sequi forum laicale" (*Bracton, De Legibus*, lib. v. c. xi., ss. 1, 2, p. 401). And so there was prohibition if the ecclesiastical court entertained suit of debts not by testament (*Ibid.* c. iii. s. 2). From this it is clear that the secular courts claimed jurisdiction wherever temporal rights or interests were involved, except where the secular law itself, as in the case of testaments, had given the ecclesiastical courts jurisdiction. Hence the distinction drawn as to contract, although breach of contract might be, as breach of good faith, a spiritual offence. Hence also the distinction as to debts not arising out of testament (as legacies), although non-payment of debts may be a spiritual offence. And it is obvious that if the ecclesiastical courts were allowed to claim cognizance of every matter which involved a spiritual offence, as every matter in the world *might* involve such an offence, they would have jurisdiction over *all* matters, and there would be constant conflicts between the two jurisdictions, the ecclesiastical often deciding on different principles from the secular, because deciding *in foro conscientie*. And it is obvious that it would be no sufficient answer to urge that the ecclesiastical courts could only enforce their sentences by excommunication; for if it had any deterrent effect (as it must be presumed that it would have in a country professing the Roman Catholic religion), to the extent to which it had effect it would obstruct the exercise by the king's courts of their jurisdiction, and tend to erect an ecclesiastical sovereignty in the realm often opposed to the secular sovereignty. How far this is or is not the necessary consequence of the principles of the church could be a theological question; the legal question, it is conceived, and, even upon the view of the church, the practical question, would be how far the state, as the law then stood, recognised, or allowed of the exercise of such a power by the church when not in accordance with the law of the state. Now, to the extent to which the exercise of her purely spiritual power was *not* antagonistic to the secular law, the state considered its exercise spiritual, and allowed of it; but so far as it was antagonistic to secular law, and so directly interfered with temporal matters, which were its province, the state deemed it not purely spiritual, and did not allow of it. Thus Bracton says—"Quia clericus in nullo conveniendus est coram iudice seculari quod pertinet ad forum ecclesiasticum, sicut in causis spiritualibus vel spiritualitate annexis, ut si pro peccato vel transgressionem fuerit penitentia injungendi, et quo casus iudex, ecclesiasticus habet cognitionem, quia non pertinet ad Regem injungere penitentias, nec ad iudicem secularem, nec etiam ad eos pertinet cognoscere de iis quæ sunt spiritualibus annexa; sicut de decimis et aliis ecclesia preventionibus. Item nec de catulis quæ sunt de testamento vel matrimonio, et quamvis in omnibus aliis actionibus sive placitis ad forum seculare pertinentibus videatur quod clericus sequi debeat forum seculare, et ibi agere respondere ratione rei vel contractus ubi agitur realiter vel personaliter, sicut in actione injuriarum vel criminis dum tamen civiliter agatur, secundum quod videri poterit tota die, quod si clericus quia laicum fœdum non habet, summonitionem suscipere noluert nec plegios invenere mandabitur episcopo vel ordinario loci quod faciat talem venire coram rege vel iudiciariis suis ad respondendum. Quamvis sunt qui dicant (very likely alluding to the claims set up by archbishop Boniface, as stated in the text), 'quod de nullo placito tenentur respondere, nec ratione rei contractus, vel delicti coram iudice secu-

liberty, particularly as such violators and perturbators were subjected to excommunication by the confirmation solemnly passed of

*lari, et salva pace eorum, videtur quod fit in omnibus actionibus et placitis civilibus et criminalibus præter quam in executione iudicii in causa criminali ubi laicus condemnandus esset ad amissionem vite vel membrorum, et quo casu quamvis iudex seculari habet cognitionem ut cognoscat de crimine, tamen nec habet potentiam exequendi iudicium, non enim possit degradare clericum, et ideo propter ejus defectum habet ordinarium executionem iudicii,"* which is wrong, seeing that as he goes on to chap. ix., that bishops could not give capital sentences. "In causa enim sanguinis judicare non potest nec debet" (c. ix.), and his inference therefrom that, therefore, they should execute sentences they could not pronounce is inconsistent with what he allows to be recognised as the law of the church; and the natural inference from what he states elsewhere in an earlier part of his work, viz., that, as the secular courts could not execute their sentences, they had no jurisdiction; and ultimately the vexed question was settled practically in that way, by the recognition of privilege of clergy, which withdrew the culprit, although after conviction, from the secular jurisdiction. But this was because the law of the state did still recognise the privilege of clergy, for Bracton admits that the secular courts could not execute sentences in such cases. Bracton therefore went wrong in one direction, as Boniface went wrong in the other. The archbishop would not allow secular jurisdiction in any case over clerks. The judge insisted upon it even in cases where the law itself allowed of and recognised an immunity against it. And the only practical test, in the determination of the question in cases where the exercise of the church's power interfered with secular law, is whether the matter was within the scope of secular law, and, if so whether the state allowed or recognised the claim of the church against it. Now, no one could doubt that matters of debt, of contract, of perjury, or of murder, were properly within the scope of secular law. It allowed the jurisdiction of the church in cases of capital crimes by clerks (for the special reasons mentioned by Bracton), and also in cases of debt arising out of testament, i.e., legacies, but not in other cases. And Bracton goes on to state that prohibition would go to the ecclesiastical judge, even although a papal delegate, if he interfered in other matters, as "*De tanta terra,*" or "*de catellis vel debitis quæ non sunt ex testamento vel matrimonio*" (c. iii.) If it was the case of a papal delegate, the form was different, but that was the only difference. "*Si delegati fuerint à domino papa, vel alio ordinario, tunc sic. Prohibemus vobis ne teneatis placitum in curia christianitatis auctoritate litterarum domini papæ.*" So there is a chapter as to prohibitions in cases relating to advowsons. "*Prohibitio si rectores ecclesiarum contendant inter se sine patronis,*" because the right of the patron, it was supposed, might be prejudicial, though, as it would be res inter alios acta, it would not be so. "*Prohibitio si clericus præsentatus ab eo quæ optinuerit implacitatus fuerit à clerico ipsius qui amisit in curia regis,*" which seems contrary to what was laid down as law by Glanville. So, generally, "*prohibitio contra eum qui sequitur contra iudicium factum in curia regis*" (c. iv.) And then as to presentations and admissions of clerks presented, "*Si minus idoneus fuerit recusatus, et idoneus admittatur, ad querelam breve formatum à justiciario.*" "*Est et aliud genus prohibitionis ubi quis clericus præsentatus ad ecclesiam pro domino regum propter insufficientiam recusatus fuerit, et alius idoneus institutus, si velit inquietare institutum;*" that is, if when the bishops had rejected a clerk as not a fit and proper person (which was admitted to be of ecclesiastical cognizance), and another had been instituted, he was disturbed by the other. It was decreed that this was of temporal cognizance (although, of course, it was also an ecclesiastical offence), because the clerk then had a freehold vested in him at law, and a temporal right of action, which, however, was a better reason for allowing him to sue at law, than not allowing him to sue in the ecclesiastical court. But it must be observed that this great question of ecclesiastical or lay jurisdiction was regarded by the sovereigns, and disputed by the lawyers, with so keen an interest, not merely from the jealousy which had arisen between the two jurisdictions—especially on account of the superior learning of the clergy—but on account of its practical bearing upon the vital question of *fees*; which had begun to be regarded with great interest as a source of revenue to the crown, and of profit to the king's judges. And although Bracton was a cleric, he was a king's cleric, for he was a king's judge; so his sympathies would be with the crown and the king's courts on such questions. On the other hand, as he was a cleric as well as a lawyer, it may be presumed that he would be careful how he went beyond the line of sound doctrine, as laid down by



*Magna Charta*).<sup>1</sup> or whether they took cognizance of actions personal concerning contracts, or *quasi-contracts*, trespasses, or *quasi-*

the church, though he would probably stretch it to the utmost. And the instance just given is a strong one, for the clerk rejected would have a right of appeal, and the prohibition is directed to the papal delegate, the suit prohibited being a spiritual suit before him, though it appears to be after the canonical institution of the other clerk; and it is to be presumed that there would be no such institution after a caveat or notice of appeal; "*habet ipsum in placitum de eadem ecclesia coram vobis auctoritate litterarum domini papæ, et quoniam injustum est quod idem A ipsum B implacitet qui per ipsum archiepiscopum sicut idonea ad eandem ecclesiam admissus et canonicè institutus*" (c. iv). The case, it will be seen, was close to the line of a downright interference with the admitted rights of the ecclesiastical courts to determine questions of canonical fitness of clergymen for benefices. So of the next case of prohibition, where the king had, by reason of the vacancy of a see, presented to a living belonging to it, which involved the royal claims to the custody of vacant benefices. That the distinctions drawn were often of great difficulty and nicety is manifest from some of the cases put by Bracton. Thus as to a suit by a spiritual person for disturbance of a right to *nova garba*, if the possession had been long and peaceable, and the disturbance recent, so that the right really was not in question, the ecclesiastical court had cognizance of, otherwise not so (c. viii.) So in cases between ecclesiastical persons as to payments for services purely spiritual, as if a religious house were bound by deed to pay a certain rent to a clerk as curate or chaplain. The language of the writ allowing the ecclesiastical court to proceed is curious, and contains a clear recognition of canon law, so far as it did not trench upon the jurisdiction of the king's courts in matters temporal, "*quod cum juri canonico sit contrarium, quod si clericus clericum, et maxime viros religiosos convenient coram iudice ecclesiastico, quod idem religiosi quasi religionis suæ immemores et de ecclesia (salva pace eorum) male scientes, ut negotiū processu impediunt, et iudicium ecclesiasticum subterfugiant,*" &c. But the next chapter declares the law to be that the ecclesiastical courts had no jurisdiction in matters of contract, notwithstanding a supposed breach of faith, nor matters of debts or goods, except arising out of testament: "*Item, jurisdictionem suam non mutat fidei interpositio, nec sacramentum prestitum. Et illud idem dicendum erit de debitis et catallis que non sunt de testamentis*" (c. ix.) On the other hand, it was laid down that there could be no prohibition of things purely spiritual: "*Non habebit prohibitio in curia Christianitatis de aliquo spirituali vel spiritualitate annexo, sive agatur inter clericos sive inter clericum et laicum, vel ubi agatur ex causa testamentaria vel matrimoniale vel de aliquo de quo sit poenitentia injungenda pro peccato*" (c. xl. fol. 40). "*Nec de aliquo tenementi, quod si sacrum et per Pontifices Deo dedicatum. Item quasi sacra, quia spiritualitati annexa, sicut sunt terræ datæ ecclesias tempore dedicationis cum ideo deficiis in eadem contentis, et in pertinentiis eorum. Item non habebit prohibitio si de decimis agatur. Item si pecunia legitur et petatur ut debitum in foro ecclesiastico ex causa testamentaria. Item ut si clericus clericum spoliaverit de decimis vel aliis de quibus cognitio pertinet ad forum ecclesiasticum*" (c. x.). Next, however, comes a chapter which has an important bearing upon the above-mentioned constitutions of the archbishop as to excommunication. It is headed, "*De iudicibus qui fraudulentè simul faciunt suas comminationes ut facilius procedant ad excommunicationem,*" in order, as the chapter explains, to evade the prohibition. "*Sunt iudices qui, cum citatus comparuerit de re ad cognitionem suam non pertinente, ut prohibitionem evadere possent, faciunt ei tres comminationes quam libet post aliam primo die litis, et ubi satisfecerit eorum voluntate, innodant eum vinculo excommunicationis et pendente prohibitionem, cum talis in hujusmodi excommunicatione prestitent pro xl. dies, ut prohibitionis prosecutio ne evadant, ad impetrationem eorumdem, iudicium significat ordinarius Regi quod talis in excommunicatione extibet per tantum tempus, et procurat captionem,*" &c., the writ "*De capiendis excommunicato,*" for the arrest of an excommunicated person remaining arrested forty days. It is most important to observe and to bear in mind that the secular law did then thus enforce the sentence of excommunication by the temporal punishment of imprisonment, because it has a double bearing upon the question raised by the above-mentioned canons, especially

<sup>1</sup> A D. 1253. When Boniface and the other bishops solemnly in Westminster Hall pronounced excommunication against the infringers of that statute. *Vide ante*, vol. i. 258.

trespasses, either between clerks, or between clerks complainants, and laymen defendants; if any archbishop, bishop, or other prelate

as to excommunication. For, on the one hand, it implied a recognition by the law of the state of the right of the church to enforce her laws by that sentence (so that it did not interfere with the jurisdiction of the king's courts); and, on the other hand, it entitled and indeed necessitated the state to consider what were the cases in which it would allow such interference with the jurisdiction of its own courts; for otherwise there would be two inconsistent and compulsory jurisdictions, each supported by the arm of the temporal power, which would be absurd. Hence in the above chapter, it will be observed, that the right of the ecclesiastical court to pronounce sentence of excommunication even in matters which might be also of secular cognizance is not disputed, so long as it was not directed to thwart and obstruct the jurisdiction of the secular courts. And hence, on the other hand, the canonical law itself admitted that the extent to which it was allowed thus to interfere with the secular jurisdiction as to matters which came within it, must depend upon the secular law. It was one thing to claim, as the church, *jure divino*, to say that such an act was an offence against her laws, and to pronounce a purely spiritual and private sentence or penance as the condition of her spiritual privileges; and quite another thing to claim to pronounce judicial sentences, having the sanction of the state, against the courts of the state. The degree to which the church could use the arm of the state must necessarily depend upon compact with the state. Hence the claim set up by the archbishop for an unfettered use of the judicial sentence of excommunication was a very formidable one in that age, and in such a state of the law, when the sentence had temporal consequences, and might, as the other articles showed, be used against the state itself with the aid of the power of the state. These observations also have another bearing, to show how entirely these questions of the extent of canon law are confined to countries where the Roman church is recognised, and not only recognised, but established by the state. It was this, so to speak, which gave the state its *locus standi* in the matter. For Bracton admits that, as to the mere enjoining of penance by spiritual sentence, the courts of law would not interfere. The judicial sentence of excommunication was quite different, as it involved temporal consequences by the law of the state. If it had not, it is implied that the state would have had no right to interfere. It claimed to interfere because the church was claiming to use the power of the state. And the views of the state as to how far the church should be allowed to do this had materially altered since the Saxon times. It was here our author was in error. He fancied the church had changed; but it was not so; it was the state. It was not that the church had encroached in the reign of Henry II., or receded in the reign of Henry III. It was the state which had altered its policy, in consequence of an alteration in public opinion. The Saxon times no doubt were times of superstition and of ignorance, and the ecclesiastical power had then an ascendancy, which naturally declined, as the preponderance of intellect and education on its side began to lessen. No one who has mastered the spirit of the Saxon laws could conceive it possible that the king's court (if there were one) could order a bishop to be arrested for proceeding in an ecclesiastical cause. The thing would be impossible; for the bishops were recognised as the principal members of the courts, for the purpose of instructing the courts in the laws spiritual and secular, and therefore as to the respective limits and bounds of each. But Bracton goes on to show that if a bishop, or even a papal delegate, proceeded in defiance of a prohibition, he should be arrested or attached. "*De iudiciis attachandis si procedant contra prohibitionem.*" "*Breve de iudiciis attachandis si auctoritate litterarum domini papae.*" &c. (c. xii. fol. 409). Enough has been said to show how serious the question was; one of equal delicacy and difficulty. On the one hand was the state allowing the church to use the arm of secular power to enforce her sentences; and, on the other hand, the church, claiming to use it against the state itself. On the one hand, the church indirectly claiming to arrest—or to have arrested—the officers and ministers of the state; and, on the other hand, the state threatening to arrest the officers and ministers of the church, and even the delegates of the sovereign pontiff himself. It is not likely that the canon law, based, as it was, upon the civil law—which had firmly and clearly settled the principles upon which such questions were to be determined—should have led to, or allowed, such a complete dead-lock of the two powers of church and state. And our author was entirely in error in supposing that it had ever laid down doctrines which could lead to it. It must be evident that in the canons or constitutions set up by the archbishops, were some serious departures from the principles of canonical

were called upon by the king's letters to answer before a secular judicature upon any of the before-mentioned points, it was ordained by the authority of this clerical council, that they should not appear; for these were all pronounced by the same authority to be spiritual matters; and further, that no power was given to laymen to judge God's anointed (as laymen, instead of an authority to command, were under a necessity to obey the church and churchmen);<sup>1</sup> and they were directed, either to go, or to write to the king, to inform him that they could not, but at the hazard of their order, obey such mandate.

He further ordained, that if the king's prohibition or summons should speak, not of tithes, but of right of advowson; not of breach of faith, or perjury, but of chattels; not of sacrilege or disturbance of ecclesiastical liberties, but of trespass of some of his subjects;

law, and claims to exclusive jurisdiction, which went beyond what the canon law warranted. It was on that account they were disallowed by the see of Rome, and not from any change in papal policy. It is plain that the archbishop virtually claimed exclusive jurisdiction in every case in which a spiritual offence might enter, for he claimed jurisdiction, and also claimed unfettered power of excommunication, which might be used to enforce the sentences of that jurisdiction, even although opposed to secular law, upon matters admitted to be within secular jurisdiction. To have allowed this would have been to constitute the ecclesiastical tribunals the *sole*, or at all events the *supreme* tribunals of the realm. Yet in nothing is the canon law more clear than in holding the distinction between the two kinds or orders of power, and allowing its due province to each: and the sounder views of the canonists only allowed of a superiority of the spiritual over the temporal in the *sense* of its indirect spiritual or moral influence by its sentences *in foro conscientie*. To any extent beyond that, *i.e.*, to the extent to which it used the arm of the state, it must depend upon the assent of the state. The canons above mentioned went beyond this limit, and did not have the assent of the state. Therefore they were disallowed. The distinction between the two powers was well understood in that age, and by ecclesiastical authors, some of whom Bracton, as a cleric, had no doubt read. "*Spiritualis siquidam potestas non ideo presidet, ut terrenæ in suo jure præjudicium faciat, sicut ipsa potestas terrena quod spirituali debetur nunquam sine culpa usurpat*" (*Hugo de St Victor de Sacramento*, lib. ii. part i. c. vii. p. 608). And again, "*Secundum causam justitia determinatur, ut videlicet negotia sæcularia a potestate terrena spirituali vero et ecclesiastica à spirituali potestate examinentur*" (*Ibid.* c. viii.). It would be difficult to find anything in Bracton opposed to this. There were no doubt theories of divine right, but it will not be found that they were ever adopted by the popes in any other sense than this, that their power of spiritual direction over the members of their own church was of divine right. It was nobler than that of princes in this sense, that it was exercised over the soul, whereas that of princes was exercised over the body. "*Principibus datur potestas in terris, sacerdotibus autem potestas tribuitur et in cælis, illis solummodo super corpora, istis etiam super animas, unde quanto dignior est anima corpore, tanti dignior est sacerdotum quam sit regnum.*" These were the words of Innocent III. (*Responsio Domini Papæ—Bocage Epistol. Innocent III.* p. 527, 8). What was this but in effect saying that the power of the church, *jure divino*, was entirely over the soul, on which account alone it is nobler than that of princes, which is over the body? But it follows plainly from this that when the church exercised power over bodies, by the aid of the state, it could not be *jure divino*, and must, therefore, depend entirely on compact with the state. That being so, the question would be what was the extent to which the state allowed it. The archbishop's canons went beyond that limit, and therefore were disallowed; and disallowed by a successor of Innocent III. in exact accordance with his own views. This seems to have been the plain truth of the matter.

<sup>1</sup> This is the language of the canon law: *Laicis super ecclesiis et ecclesiasticis personis nulla sit attributa facultas, quos obsequendi movet necessitas, non imperandi autoritas.* Decret. lib. i. tit. 10.

then the prelates were to make answer, that they neither had, nor pretended to have cognizance of rights of advowson, nor of chattels, nor of things that belonged to the king's courts: but only of tithes, and other things merely spiritual, appertaining to their office and jurisdiction, and to the safety of souls: and they were to pray him, that he would not prohibit their proceedings in such cases. To this extent did they state their claim of jurisdiction.

The manner in which the council directs the bishops to act in support of this jurisdiction is very worthy of notice. It directs that the bishop who was immediately affected by the king's interposition, should admonish him to desist. If he did not desist upon this representation, then the archbishop was to wait on the king, or, in his absence, the bishop of London, as dean of the bishops, taking with him two or three more bishops, and if, after this, the mandate was enforced, the sheriffs and officers who made the attachment or distress were to be excommunicated, and their lands laid under an interdict: if clerks and beneficed, they were to be suspended and deprived: if not beneficed, they were not to be admitted to any benefice for five years. Canonical punishments were also inflicted on those who advised, dictated, or penned the writs. If the king did not, upon this, revoke such process, the bishop immediately affected was to put under an interdict all the villas and castles of the king within his diocese: if he still persisted, the other bishops, as in a common cause, were to do the same. If the process was not revoked within twenty days, then the archbishop and bishops were to put their whole dioceses under an interdict.

Such was the process devised by this council of churchmen against the king, if he presumed to encroach on their clerical privileges by the forms of law;<sup>1</sup> but the pope, who saw reasons for changing his policy with respect to the church and churchmen in this country, and began to entertain some jealousy of their independence, readily consented, on the application of the king, to annul the whole of these provincial constitutions.

These canons, however, made a variance between the temporal and ecclesiastical power. In the year 1267, which was the 51st of this king, the archbishop Boniface and the rest of the clergy made a formal complaint to parliament, and exhibited many articles as grievances, called *articuli cleri*. What the contents of these articles were we are ignorant, except so far as can be collected from the mutilated remains of some of the answers given by the parliament. From these, and from the tenor of the before-mentioned canons, it may be conjectured what was their principal aim.<sup>2</sup>

Such was the state of the law, whether common or ecclesiastical, at the close of this reign.

---

There was not in this king, nor in his ministers, any remarkable

<sup>1</sup> Vid. Lyndw. Provinc. ad finem. Johnson's Canons. Spelm. Conc.

<sup>2</sup> Hum. vol. ii. 192.

<sup>3</sup> 2 Inst. 569.

attention to the cultivation of our laws. They were all too much employed in concerting schemes of defence against the rebellion and intrigues of the potent barons (a). However, notwithstanding this neglect, and the convulsions attendant on civil broils, the events of this reign had a very great effect in promoting the improvement of our laws.

Hitherto our kings had been kept under no rules of government, but had exercised a prerogative above law, except such as the necessity of the time and their own discretion prescribed them. The establishment of the Great Charter, as it defined certain points of supreme authority, and ascertained some valuable privileges of the subject, so far put a restraint upon the royal power. The king had now certain bounds limited to him, which he could not transgress without the invasion being perceived, and the nation taking immediate alarm.

(a) It is strange that our author should not have noticed the important advance made in this reign towards a representative constitution. As already mentioned, the great Charter of John contained this clause: "No scutage or aid shall be raised in our kingdom (except in those specified cases warranted by feudal law), but by the general council of the kingdom. And we shall cause the prelates and greater barons to be separately summoned by our letters; and we shall direct our sheriffs and bailiffs to summon generally all who hold of us in chief." In the charter of Henry III., indeed, this matter was reserved for further consideration, as grave and doubtful; but, as Sir James Mackintosh observes, "the formidable principle had gone forth; and though every species of impost, without the authority of parliament, was not expressly renounced until the *Confirmatio Chartarum*, in the 15th Edward I., still, during the reign of Henry III., immense advances were made towards the establishment of a representative assembly." Representatives were more than once appointed by the barons, even to watch over the administration of justice; and it is observed by the historian just quoted, "that these and other measures of the kind, proposed or adopted in this reign, may be considered some irregular approach to the principles which the constitution afterwards, in its more mature age, applied more effectually to the same purpose" (*Hist. Eng.*, vol. i.). In the Parliament of Oxford, it was ordained that a body of barons should be chosen, part by the council, part by the parliament, to redress grievances and reform the state, subject, however, to a parliament to be assembled thrice in the year, and who were to be informed of breaches of the law and justice throughout the country, by four knights, to be elected for that purpose by each county (*Rymer*, i. 375, 377, 38). This was the course taken by the barons at the time of the first charter, under John; and they amounted, of course, to a complete revolution, and led to civil war, as before. Yet it is difficult to see what other course could have been taken to ensure an observance of the law and an honest administration of justice. The great difficulty, as Guizot observes, in that age, was as to guarantees or securities. It was indeed recognised and laid down by Bracton in this reign, that the king should govern with the advice of a council, "*Legis habet vigorem, quicquid de consilio et consensu magnatum, et republice commune sponsione auctoritates regis juste fuerit definitum.*" But this implied that authority emanated from the king, though under the advice of his council; and it was far removed from the compulsory imposition of an authority over the king, however necessary it might be, in consequence of the abuses of the age, and the absence of constitutional control. This administration of affairs more or less lasted for some years, during which, however, a more constitutional system, by means of elective representative assemblies, by degrees gained ground. The learned Lingard has collected numerous instances of royal ordinances for the election of knights of the shire to inquire into grievances, or superintend the collection of taxes. This system, indeed, had begun under John. In the most ancient instance of it on record, in the year 1207, the subsidy was collected under the inspection of the itinerant judges; but the method was found accompanied with inconvenience and delay; and, in 1220, we find writs to the sheriff, appointing him the collector, in conjunction with two knights, to be chosen

Nor was the disposition which Henry so frequently showed to break through this new restraint without some good effect. It occasioned resistance in the barons, which ended in repeated and more solemn confirmations of this great declaration of the subjects' rights. In the meantime, the jealousies of the people, long engaged on this one object, wrought wonderfully on their minds; the violence with which the observance of this law was demanded, might inspire a habitual regard for laws in general.

The king felt very uneasy under the restrictions imposed by *Magna Charta*: and not forgetting the arbitrary manner in which his predecessors had ordained, suspended, or qualified laws, he used

in a full court of the county with the consent of all the suitors (*Brady*, ii., App. 149-196). In like manner, among the demands of the barons under John, one was that two justices should go their circuits four times a year to hold assizes, with four knights of the shire, chosen by the county. Under *Magna Charta* twelve knights were to be elected in the county court of each county, to inquire into civil customs of sheriffs, &c. In 1223 the king (Henry III.) ordered every sheriff to inquire by twelve knights what were the rights and liberties of his shire; and, in 1254, he ordered that two knights should be chosen by the men of every county to assemble at Westminster, and determine, with the knights of other counties, what aid they should grant. In 1258 the king appointed four knights of each county to inquire into all the excesses and injuries committed by judges, sheriffs, and bailiffs (*Brady*, ii., App. 196). In 1261 the earl of Leicester summoned an assembly of knights, to be chosen for each county; and though that of course was without lawful authority, still it was another great step in advance towards a constitutional legislative assembly. This was all under the administration of affairs already mentioned, and which continued for several years; but as it was a virtual deposition of the king, it could not be acquiesced in, and his attempts to get rid of it led to civil war. In the result, however, it led, in 1265, to the assembling of the first real parliament of England. "That assembly met," says Sir J. Mackintosh, "according to writs still extant; and the earliest of the kind known to us, directing the sheriff to elect and return two knights for each county, two citizens for each city, and two burgesses for every borough in the county." He observes that in the great Charter of John the tenants of the crown alone were mentioned as forming the council, along with the barons and prelates; and the principle of *general* representation by election was now first applied. But, as already mentioned, it had been growing up, as regards the counties, for a long course of years. And not less so as regarded the boroughs. "During the lapse of two centuries the cities and boroughs had silently grown out of their original insignificance, and had begun to command attention, from their constant increase in wealth and population. Taking advantage of the poverty of their lords, the inhabitants had purchased for themselves, successively, the most valuable privileges. In lieu of individual services, they now paid a common rent, their guilds were incorporated by charter, and they had acquired the right of choosing their chief magistrates and enacting their own laws. Formerly when the king obtained an 'aid' from his tenants-in-chief, he imposed a tallage on his boroughs, which was levied at discretion by capitation tax on personal property. They frequently offered, in place of the tallage, a considerable sum, under the name of a gift, which, if accepted, was assessed and paid by their own magistrates. This was in reality taxing themselves; and when the usage had been once introduced, it was more convenient and more consistent with national customs that the new privilege should be exercised by deputies assembled together." Therefore, in the parliament of 1265, the representatives of the cities and boroughs, it will be observed, were summoned to parliament, as well as those of the counties; and although, as this was under the auspices of Leicester, it was abandoned after his fall, the formidable principle (to use the words of Sir J. Mackintosh) had been introduced; and in the next reign it was again asserted and acknowledged, and henceforth there was a representative assembly, composed of elective representatives of the counties, the cities, and boroughs of England, summoned to sit in one house of parliament, the peers and prelates sitting in the other. Thus, by slow degrees and gradual progress, arose the parliament of England, the first assemblage of which undoubtedly signalled this reign.

frequent pretences to avoid a compliance with it. In the writs, at one time, directed to the sheriffs to enjoin a universal observance of the Charter, he caused a remarkable clause to be inserted; namely, that those who did not pay the fifteenth granted at the time of the late confirmation, should not, for the future, be entitled to the benefit of the liberties thereby confirmed.

He carried his power of dispensing much further; he is said to be the first of our kings who employed the clause of *non obstante* in his patents and grants. Henry, when remonstrated with upon this innovation, alleged the example of the pope, and claimed an equal right. Thus were the usurpations of the pontiff, against which our kings had heretofore made the most determined stand, become precedents for their own invasions of the national laws.

There are some few instances in which Henry took a personal part, in enforcing the execution of the laws (*a*). When a jury in Hampshire had acquitted some felons, contrary to plain evidence, and it was afterwards known that they themselves had been in the confederacy with the offenders, he, in a rage, committed them all to

(*a*) The *Placitorum Abbreviatio* contains records of the pleadings and proceedings in the courts from the reign of Richard I. to that of Edward II., and they contain a large collection of the *placita* of this reign, all taken from the proceedings in the *Curia Regis*, and most of them suits between party and party, *i.e.*, common pleas. That court, before the Charter, had been the exchequer, as appears from numerous entries; but when the Charter had enacted that common pleas should not follow the person of the king, as that court did, there was another court established—the Court of Common Pleas, or the “Bench,” as it was called, to distinguish it from the *Curia Regis*—the court held before the king, which was established as early as the reign of Henry II., as a court of ordinary jurisdiction. So early, however, as the reign of John, it was settled that pleas before the king’s justices of the “bench,” *i.e.*, his superior judges, so called to distinguish them from the justices itinerant, who were his inferior judges, were in law heard before him. In that case between Henry de Rocham and the abbot of Leicester, before the justiciaries of the bench, the abbot pleaded a charter of Richard, that he should not be sued, except before the king or his chief justiciary; but it was held that all pleas held before the justices of the bench were deemed to be in law held before the king himself (*Plac. Abbrev.*, 32; *Hale’s Hist. c. i. p. 147*). Thus the *curia regis* had become established as a regular judicial tribunal, with ordinary jurisdiction between subject and subject; and from the numerous entries of its proceedings, it appears that it had a regular procedure. In the reign of Henry III. much attention appears to have been given to the manner of pleading; and Bracton not only makes constant reference to the subject, but has a division of his work expressly allotted to it, under the head, “*De Exceptionibus*.” These often are taken from the Pandects, while the phrase, *Litis contestatio*, or issue, is taken from the Roman law. There are numerous instances of pleading in Bracton. Thus, among the pleas to an assize, “*Liberum tenementum habere non potuit, quia non tenuit tenementum illud nisi ad terminum annorum*” (*Bracton*, f. 268, a). The system of pleading, also, had become fully established, though still in its first and more natural state. This is shown by the *Placitorum Abbreviatio*, which contains extracts from the records from the time of Richard I. to Edward II. In the time of John there are numerous entries of pleading. Thus, in answer to a title founded on a fine, it was pleaded, “*Quod si finis ille factus fuit, per deceptionem et fraudem factus fuit*” (*Plac. Abbrev.*, 38; *Bed. rot. 4.*). So, where a defendant pleaded a deed made by the father of the plaintiff, the plaintiff replied, “*Quod cartam quam profert sub nomine patris sui nec dedit nec concedit, &c., sed qualiter carta illa facta fuit vel a quo, semper postquam facta fuit presentavit pater ejus personam,*” &c. (*Plac. Abbrev.* 92; *Kent. rot. 22*; and see 48 *Linc. rot. 7*; 39 *North. rot. 6*). So, in an assize of *mort d’ancestor*, the tenant pleaded that the demandant was seised himself *post obitum* of the ancestor and by fine (of which he produced the chirograph), quit-



prison, and ordered another jury to be impannelled.<sup>1</sup> Henry stood forth himself in parliament as the prosecutor of Henry de Bath, chief justice of England, when some charges of malpractice were exhibited against him.<sup>2</sup>

The administration of justice was sometimes interrupted by the violence of the times. It is related, that in 1224, Fowkes de Breaute, when thirty-five verdicts of disseisin had passed against him, came into court with an armed force, seized the judge, and imprisoned him in Bedford castle. This offender was afterwards banished;<sup>3</sup> but though *his* life was spared, his brothers and other noblemen, to the number of twenty-four who assisted in this outrage, and stood a siege of the castle against the king's forces, were all hanged (*a*).

The sources of information begin at this period to be more authentic. We have, in this reign, some statutes enacted by the legislature, besides the Charter of Liberties and the Charter of the Forest. These statutes are either to be found on the rolls in the Tower, or in some memorials, which have

Statutes.

claimed the land. The demandant replied "*Quod ipse nunquam fuit seiscitus de terra quam petit, nec nunquam eam teneat. Et inde petit se super iuramentum, &c. Et cum habuerit seiscitum talem, &c., bene ostendet quod concessam illum nec fecit nec facere potuit. Et petit alibi aliosari quod chirographum illud non est, factum in forma aliorum chirographorum.*" &c.; and so argues against its genuineness (*Ibid.*, 88 *Sess. rot.* 21; and see 48 *Line. rot.* 7; 59 *Berk. rot.* 2; 59 *Line. rot.* 6). So, in a case concerning a writ of *land in maritagium*, "*Dicit quod Remulphus non potuit dare illum terram in maritagio, quia obijt inde seiscitus; et inde petit se super iuramentum.*" (*Ibid.*, 59 *Line. rot.* 79; 79 *Wor. rot.* 2). So, in a writ of *mort d'ancestor*, the tenant pleaded "*Quod terra illa pertinet ad ecclesiam suam, quam habet ex dono regis Ricardi, et ecclesia inde est seiscita.*" The plaintiff then denied the seisin of the church, "*Robertus dicit, quod frater suus inde fuit seiscitus in dominico suo, die qua rex Ricardus illum ecclesiam dedit predicto Herberto; ita quod ecclesia illa tunc non fuit seiscita nisi de servis illius terre.*" (*Plac. Abb.* 44; *Staff. rot.*, temp. Joh. n.). So, in trespass for fishing in the plaintiff's free fishery, "*Libera piscaria,*" the defendants pleaded that they fished there as in a fishery where their ancestors and themselves had fished as of their common of fishery, "*Et non a propria piscaria et libera, ipsius Nicholai.*" (*Ibid.*, 134 *Berk. rot.* 163, temp. Henry III.). These cases often afford curious and interesting illustrations of the usages and institutions of the age.

(a) Without any legal trial, which, of course, was contrary to the letter of Magna Charta (just before then confirmed for the third time), but not to its spirit, for when it provides that a man shall not be condemned except in course of regular course of law, *per legem terre*, that of course implies that the regular course of law will suffice to meet the case; therefore it does not apply where the regular course of law is paralysed—as in the case referred to—by a rebellion, against which the ordinary course of law is powerless. Hence, although the incident is narrated in all the contemporary chronicles, and occurred immediately after the confirmation of the Great Charter, it does not appear either then or at any subsequent time to have been considered illegal, and it is the earliest known instance in our annals of the exercise of martial law—i.e., *lex martialis*—or the law of war. It is very remarkable that Hale states that in this reign they had a particular commission and judicatory for matters happening in time of war, and cited *Placita de Tempore Turbationis*, wherein are many excellent things (*Hist. Com. Law*, c. vii.). This must have been the exercise of martial law by means of court-martial; it is impossible to conceive what else it could have been. Hale does not cite any authority for the statement, but no doubt he had some foundation for it. No doubt an execution in time of peace, except in due course

<sup>1</sup> M. Paris, 509. Hume, vol. ii. 228.

<sup>2</sup> Parl. Hist. vol. i. 51.

<sup>3</sup> M. Paris, 221-224. Wilk. Sax. Leg. 382.



delivered them down to us as acts of parliament, and therefore we are not at liberty to dispute the genuineness of them (*a*). Many parliaments were holden in this long reign, and it is thence inferred, that many acts must of course have passed, which have not reached our times; though it is remarkable, that Bracton, except in four or five instances,<sup>1</sup> quotes no statutes but those which are now extant. So destructive has the hand of time been, that only two of those few we have are to be found upon record.

The only statutes of this reign to be found on the statute-roll, are *Magna Charta* and *Charta de Foresta*. The rest are not on record, but only preserved in books and memorials. Such are the statutes of Merton and Marlbridge (*b*). This destruction of ancient documents has given occasion to the following position, that notwithstanding the record itself be not extant, yet general statutes made within time of memory, that is, since the first of Richard I., do not lose the force of *statutes*, if any authentic memorials of their being such are to be found in books, seconded with a general received tradition attesting and approving the same.<sup>2</sup> In conformity, perhaps, with this favourable presumption, it has become a rule, that courts are to take notice of general acts of parliament, without pleading them; for such statutes are never to be put on the issue of *nul tiel record*, but are to be tried by the court; and, if there be any difficulty or uncertainty, the judges are to make use of ancient copies, transcripts, books, pleadings, or any other memorials to inform themselves.

law, would be illegal, and Hale cites such a case, in which it is assigned as the ground of reversal that the judgment was in time of peace. This implies that in time of war prisoners taken might be tried by court-martial, though they were subjects, and that is indeed expressed by Hale in another part of the same chapter, where he says that the marshal has a judicial power over prisoners taken in war, and that martial law extends to the members of the army, or those of the opposite army; and in his *Pleas of the Crown* he lays down the law as to levying war against the crown, and shows that rebellion is war, and that it may be levied without the "pomp" of war, and even without military weapons, numbers making up for arms—so that multitudes armed with clubs or sticks may constitute an army in rebellion. From these premises, it plainly follows that if the rebellion is too formidable to be repressed by the ordinary course of law, it may be met by martial law, and prisoners executed by court-martial, as in the above case.

(*a*) "The statutes, which are extant, but not of record, are such as, though they have no record extant of them, yet they are preserved in ancient books and muniments, and in all times have had the reputation and authority of acts of parliament; for an act of parliament made within time of memory loses not its being because not extant of record, especially if it be a general act; for of general acts the courts are to take notice, and they are not to be tried by the record. Though the record itself be not extant, yet general statutes made within time of memory—viz., since Richard I.—do not lose their strength if any authentic memorials thereof are in books, and seconded with a generally received tradition attesting and approving the same" (*Hale's Hist. Com. Law*, c. i.).

(*b*) Lord Hale observes that "many records of acts of parliament have in long process of time been lost, and possibly the things themselves forgotten at this day, which yet, in or near the times wherein they were made, might cause many authoritative alterations in some things touching the proceedings in law, the original cause of which changes are at this day hidden and unknown to us; and indeed histories give us an

<sup>1</sup> *Vide ante*, vol. i. 440.

<sup>2</sup> *Hale's Hist.* 16. *Vide ante*, vol. i. 215.

The statutes of this reign which are now in being are to be found in the common editions of the statutes. The statutes from *Magna Charta* down to the end of Edward II., including also some which, because their period is not ascertained, are termed *incerti temporis*, are sometimes called the *vetera statuta*; those from the beginning of the reign of Edward III. being contradistinguished by the appellation of the *nova statuta*.

Among the remains of legislation during this reign are to be reckoned the *legatine* and *provincial constitutions*, which contributed to lay a foundation for a national canon law. It is to the collections of antiquaries and canonists, and not to any authentic depository, that we must resort for a sight of these productions of our clerical legislature. They are to be found in Spelman's Councils, and at the end of Lyndwode's *Provinciale*; not to mention that they are likewise arranged and commented amongst others in that very work.<sup>1</sup>

There are also some records of pleadings and proceedings during this reign. Besides these, there are some very few notes of adjudged cases to be found in Fitzherbert's Abridgment. These are mentioned not so much for their importance, as on account of their great antiquity, being the first of that kind of memorials which, in after times, became so numerous, and furnished the best materials for explaining the grounds, reason, and progress of our laws.

The great ornament of this reign is the treatise of Henry Bracton, *De Legibus et Consuetudinibus Angliæ*, which has been so often quoted. Bracton's book, compared with that of Glanville, is a voluminous work. The latter is little more than a sketch, as far as the plan of it goes, and that is confined to proceedings in the king's court; but the former is a finished and systematic performance, giving a complete view of the law, in

account of the suffrages of many parliaments whereof we at this day have none or few memorials extant. The instance of the great parliament at Oxford about the 40th Henry III. may, among many others of like nature, be a concurrent evidence of this, for, though we have mention made in our histories of many constitutions made in that parliament, we have no monuments of record concerning that parliament, or what those constitutions were (*Hist. Com. Law*, c. 1.) One of these constitutions seems to have given rise to an important alteration in the appointment of the sheriff, and ~ has appears to afford an illustration of Hale's remarks. We read that it was ordained that a high sheriff should be appointed annually for each county by the votes of the freeholders (*Ann. Bur.* 416; *Rymer*, 867). And we find that next year, although the sheriffs were appointed by the crown, the freeholders in each county were ordered to choose four persons, and present them to the barons of the exchequer, who should select one for the next sheriff (*Ib. Rymer*, 381; *Annal. Burton*, 428-433). And although the system of popular election was not afterwards established, yet there is no doubt that the above constitution laid the basis of a system under which a list of names, known to be approved of by the counties, is submitted every year to the council in the exchequer, and from which the sheriffs for the ensuing year are chosen. Hale says, "There are also some few laws or constitutions relative to the law, which, though possibly not acts of parliament, yet have obtained in use as such; as, *De Distinctione Scaccarii*; *Statutum Panis et Censuræ*; *Dies Communes in Banco*; *Statutum in Hiberniæ*; *Statutum de Scaccario*; *Judicium Collatrigii*, and others."

<sup>1</sup> See also Johnson's Canons.

all its titles, as it stood at the time it was written. It is divided into five books, and these into tracts and chapters.<sup>1</sup>

If this law treatise had been printed with such divisions and notification of its contents as are given in the note below, the arrangement of the whole would have struck the eye as distinctly

<sup>1</sup> Because the form in which this work is printed does not much contribute towards exhibiting to a cursory inspector the plan and design of the whole, it may be convenient to give a prospectus of the work, as shortly and clearly as possible. This I shall do by referring to the pages, as a more ready clue than the tracts and chapters.

Of the first book, the first four folios relate to the law in general, and should more properly be entitled, *de legibus et consuetudinibus Angliæ*. From fol. 4 b. to fol. 7 might be entitled, *de personarum divisione*; and from fol. 7 b. down to the end of the first book, fol. 8, *de rerum divisione*. From thence to fol. 98 may go under the general title, *de acquirendo rerum dominio*, as in the printed copy; with, however, the following subdivisions: From fol. 11 to 60, *de donatione*, with its appendages and consequences, as livery of seisin, and the like; then, gaining title by prescription, fol. 52; of incorporeal things, fol. 52 b.; of liberties and franchises, 55 b.; of confirmations, 58; in fol. 60, *de testamentis*; and fol. 62 b., *de successione*, with its consequences, as supposititious children, 69; of partition 71 b.; of homage, 77 b.; relief, 84; custody of heirs, 86; marriage, 88 b.; dower, 92, with which the second book, *de acquirendo rerum dominio*, concludes.

The third book, from fol. 98 b. to fol. 104, may be entitled, as it is in the printed copy, *de actionibus*; from 104 b. to 112 is upon courts and different appointments of justices; then, again, from 112 to 115, upon actions; from thence to fol. 159, the end of this book, is properly entitled *de coronâ*. But the several subdivisions thereof should be as follow:—Fol. 115 b., of the iter of the justices and *capitula coronæ*; fol. 118, of lèse-majesty; 120 b., of homicide; 122, of the office of coroner; 125, suit and outlawry; 131, revising outlawry; 134 b., murder; 135 b., abjuration; 138, proceeding on appeal of homicide; 141 b., of the duel; 143 of indictments; 144, of appeals *de pace et playis*; 144 b., *de playis et mathemis*; 145, *de pace et imprisonment*; 146, of robbery; 147, rape; 150, *felo de se*; 150 b., of theft; 152, of provors; 155 b., of distress and replevin, which concludes the third book.

Having thus finished his discourse upon criminal suits, he begins the fourth book, which is to treat of civil actions. This goes from fol. 159 b., to 337 b., and may be divided into four lesser parts. Thus, from fol. 159 b., as far as fol. 220 b., may be entitled, *de possessione propriâ liberi tenementi*, as it contains an account of those actions for the recovery of freeholds that were grounded upon a man's own seisin or possession. This is the first principal division; the second is, from thence to fol. 251 b., *de possessione pertinentiarum ad liberum tenementum*—that is, of actions for recovery of things appertaining to a freehold, upon the claimant's own possession of the thing; then the third division, from fol. 252 to 317 b., *de possessione aliênâ*, being an account of such actions as were grounded on the seisin of another; next follows the fourth, from fol. 317 b. to 327 b., *de ingressu*, being a writ founded sometimes upon a *possessio propria*, sometimes upon a *possessio aliênâ*. These are the four principal divisions of the third book, the first three of which divisions may be thus subdivided:—Fol. 160, of intrusion; from 161 to 220, of novel disseisin; 219, of a writ of entry upon a disseisin; 220, of *quare ejecit infra terminum*. The second contains, from fol. 220 b., of rights and easements; 222, of assize of common of pasture; 229, of admeasurement of common; 229 b., of the writ *de quo jure*; 231, common of estovers; 232 b., of nuisances; 235 b., writs of entry upon a disseisin of common and nuisance; 236 b. to 237 b., of re-disseisins and execution; from fol. 237 b. to 246 b., *de assisâ ultimâ presentationis*; 246 b., *quare impedit* and *quare non permittit*; 248, writs *ad admittendum clericum*; 251, *quare non admittit*. Here ends the second principal division. The third, beginning at fol. 252, contains from thence to 280 b., *de assisâ mortis antecessoris*; then, 281, *de consanguinitate*; 284, *de quâdâ permittat* for common of the seisin of another; 284 b., *de quo warranto*; next follows fol. 285, the *assisâ utrâq*; 288 b. to 296, *de convictione*; from 296 to 312 b., the writ of dower, *unde nihil*; 313, *de recto de dote*; 314, *de amensuratione dotis*; 315, of waste; which concludes the third principal division; then follows the fourth division, from 317 b. to 327 b., to the end of the fourth book, *de ingressu*.

The fifth book may be entitled, from fol. 334 b. to 438 b., either *de proprietate et jure* (in contradistinction to the former book), or *de actione reali*; from 439 to 443 b., *de actione personali*; 443 to the end of the book, *de actione mixtâ*. That part, *de actione reali*, may be subdivided thus:—From fol. 327 to 332 b., is upon the writ of right; from 333 to 336 b. is of summons; from 336 b. to 364, of essoins; from 364 b. to 372 b., of defaults; 372 b., of the *intento*; 376, of demanding a view; from 380 to 399 b., of vouching to warranty; from 399 b. to 438, is of exceptions; after which follows, as before stated, that *de actione personale*, and *de actione mixtâ*.

as it does the understanding upon perusal, it being, in truth, a comprehensive and particular account of the law, digested with a strict adherence to method and system. Consistently with the extensiveness and regularity of the plan, the several parts of it are filled with a copious and accurate detail of legal learning. The rules of property are explained; the proceedings in actions, through the minutest steps, are investigated and developed, while every proposition is supported by fair deduction, or corroborated by the authority of some adjudged case; so that the reader never fails of deriving instruction or amusement from the study of this scientific treatise on our ancient laws and customs.

If the matter of this book is more instructive and entertaining than Glanville, the access to it is rendered more easy by the style in which it is written. This is infinitely superior to Glanville, and much beyond the generality of writers of that age, being, though not always polished, yet sufficiently clear, expressive, and nervous. The excellence of Bracton's style must be attributed to his acquaintance with the writings of the Roman lawyers and canonists, from whom likewise he adopted greater helps than the language in which they wrote. Many of those pithy sentences which have been handed down from him, as rules and maxims of our law, are to be found in the volumes of the imperial and pontifical jurisprudence. The terms and phraseology of those two laws are borrowed by him to express the meaning of our municipal customs; and many points of law and practice are adopted from thence. The familiarity with which Bracton recurs to the Roman code has struck many readers more forcibly than any other part of his character; and some have thence pronounced a hasty judgment upon his fidelity as a writer on English law.<sup>1</sup> But the passages to which such persons take exception, if put together, would perhaps not fill three whole pages of his book; and it may be doubted whether they are such as can always mislead the reader. Upon a second consideration of those places where the Roman law is stated with most confidence, it will seem to be rather alluded to for illustration and ornament than adduced as an authority; though it is visible that Bracton, with all his endeavours to give form and beauty to our own law, by setting forth its native strength to advantage, did not refuse such

<sup>1</sup> It seems to be a fashion to discredit Bracton, on a supposition of his having mingled too much of the civilian and canonist with the common lawyer. Any notion that has got into vogue on such a subject is likely to have many to retail it, and few to examine its justness. Among others who have most decidedly declared against Bracton I find *Mons. Howard*, the Norman advocate. This gentleman has been at the pains to give an edition of Glanville, Fleta, and Britton, but has omitted Bracton, because his writings had corrupted the law of England.

That gentleman's conceptions about the purity of the law of England have seduced him into a very singular theory. He lays it down that Littleton's Tenures exhibit the system introduced by William the Conqueror in all its genuine purity; that this system was corrupted by a mixture from other politics in the writings of Britton, Fleta, and Glanville, but more particularly in those of Bracton. Full of this preposterous idea, he has published an edition of Littleton, with a commentary; and, to decide the point without more debate, has entitled it *Anciennes Loix des Français*. After this, the admirers of Bracton will not apprehend much from this determined enemy to his reputation as an English lawyer.

helps as could be derived from other sources to improve and augment it.

The value set on this work, soon after its publication, is evinced by the treatises of *Fleta* and *Britton*. These two books, the best productions of the reign of Edward I., who was an active encourager of such undertakings for improvement of the law, are nothing more than appendages to Bracton (*a*). The latter was intended as an epitome of that author, and the merit of the former is confined to the single office of supplying some few articles that had been touched lightly by him, with the addition of the statutes made since he wrote. In after times he continued the great treasure of our ancient jurisprudence, where the rudiments of the law were to be traced in their first formation—where were to be seen the origin and sense of certain notions and principles, the reason of many rules of property and of practice, which had become obscure by the change of times, with the causes that led to the framing of many ancient statutes, which would be unintelligible without the help of this author. Thus was Bracton deservedly looked up to as the first source of legal knowledge, even so low down as the days of Lord Coke, who seems to have made this author his guide in all his inquiries into the foundation of our law.

The author of this work is usually styled *Henry de Bracton*, though he has passed, as fancy or mistake may have dictated, by the names of *Bryeton*, *Britton*, *Brilon*, *Breton*.<sup>1</sup> He is said to have lived at the latter end of the reign of Henry III. There is an internal evidence that the book was written before the fifty-second year of this king; for it takes no notice of the writ of entry in the *post*, nor of the regulations about distresses, attachments, guardians in socage, and other points, made by the statute of Marlbridge; and as he quotes a case in the forty-sixth year of this king,<sup>2</sup> it must follow that the book was written, or at least received the author's last hand, some time between that and the fifty-second year. It is probable that in matters of fact the writer relied on his own experience, or the information of those he personally knew, for he quotes no decision of a court, or opinion of a lawyer, but of this king's reign, though one of them is so early as the third year. It is said that Bracton was a judge.

The clergy continued to practise in the secular courts, in the same manner as before. We find among the provincial and

(*a*) This is an entire error, as will be manifest to the mind of any one who has read both works, which are as different as possible. The suggestion of Selden that the work called by the name of Britton is an abridgment of Bracton, has been supposed to imply that both names were names of the same person, which is not likely, as the books are so different in substance and in style (as well as in language—Bracton being in Latin, and Britton in Norman-French); and it is not possible, for Bracton died before the end of the reign of Henry III., and does not mention the later statutes of his reign, and Britton goes down to the 13th Edward I. The book of Britton, therefore, belongs to *that* reign, and will be there treated of; and, as our author has analysed Bracton, it may be convenient there to analyse Britton.

<sup>1</sup> Dis. ad. Hist. sec. 2.

<sup>2</sup> Bract. 159.

legatine constitutions of this reign several injunctions to restrain them: *Nec advocati sint clerici vel sacerdotes, in foro seculari, nisi vel proprias causas vel miserabilium procequantur.*<sup>1</sup> But these, like those which forbid them accepting other secular employments, were not observed. It appears all through this reign that many dignitaries of the church were justices in the courts at Westminster, and in the eyre,<sup>2</sup> as bishops, abbots, deans, canons, archdeacons, and the like. Notwithstanding the clergy were chosen to these stations for their learning, Bracton, speaking of some judges of his time, calls them *insipientes, et minus doctos, qui cathedram iudicandi ascendunt antequam leges didicerint.*<sup>3</sup>

In former times there had been no particular domicile, or house, for the resort and education of practisers of the law. But it has generally been believed that very soon after the bench was fixed at Westminster, the practisers and officers of that court, as well as students of the law, began to settle in some place in London, most convenient for their studies, conference, and practice.

The title of *capitales iustitiiarii*, and of *iustitiiarii Angliæ*, ceased in 52 Henry III., when the title first commenced of *capitales iustitiiarii ad placita coram rege tenendo*.<sup>4</sup>

The salary of the justices of the bench, in the 23d year of this king, was £20 per annum; in the forty-third year, £40. In the twenty-seventh year the chief baron had 40 marks; the other barons 20 marks; and in the forty-ninth year, £40 per annum. The justices *coram rege* had, in 43 Henry III., £40 per annum. The chief of the bench had, in the forty-third year of this king, 160 marks per annum, and next year another chief of the same court had £100. But the chief of the court *coram rege* had only 100 marks per annum<sup>5</sup> (a).

(a) It seems to be suggested here that Bracton spoke of the clerical judges, which is scarcely likely, seeing that he was one of them himself, for that he was of the clerical profession is clear, as he is called "dialector clericus noster" by the king, in a grant to him, dated 1254 (*Anglæ Orig. Jurid.* 56). And when the whole passage is quoted, it will be seen that Bracton was not speaking of the king's judges, but of those in local courts. Having described the law as consisting in part of unwritten laws or customs, he says: "Sunt autem consuetudines placis et diversis, secundum diversitatem locorum; sicut in diversis comitatibus civitatibus, &c., ubi semper inquirendum erit quæ sit illius loci consuetudo et qualiter ut autem consuetudines qui consuetudines allegant. Cum autem hujus modi leges et consuetudines per insipientes et minus doctos, &c., sequis trahuntur ad abusum: et quistant in dubiis et in opinionibus multoties pervertuntur à majoribus qui potius proprio arbitrio quam legem autoritate causas decedunt." So that what he was aiming at was the mischief done by multifarious decisions of local courts, founded upon supposed local customs, rather than upon legal principle, the very evil reprobated by Lord Hale as existing in the county courts.

<sup>1</sup> Spelm. Conc. anno. 1217.

<sup>2</sup> *Dug. Or. Jur.* 38.

<sup>3</sup> *Dug. Or. Jur.* 21.

<sup>4</sup> *Ibid.* 104.

<sup>5</sup> Bract. l.

EDINBURGH:  
PRINTED BY BALLANTYNE AND COMPANY  
PAUL'S WORK.











